

# **The Five Faces of Federalism: A State-Power Quintet without a Theory**

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*The Rehnquist Court is well known for its many five-four decisions in favor of enhanced state power. The author demonstrates a less well known fact about this Court's five-member state-power majority—that they have no common theory of federalism. The author re-examines the principal, concurring, and dissenting opinions of the five state-power Justices in the current Court's major federalism opinions—most recently limiting the enforceability of the Americans with Disabilities Act and striking down the Violence Against Women Act—in order to derive each Justice's distinct theory of federalism. He then contrasts the theories with each other, uncovering a buried dispute over the basis of our federalist system, and revealing the disturbing fact that, behind the state-power quintet's several recent increases in state power vis-à-vis national power, there lies no majority theory on which these changes are based.*

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Apologies to Deborah Jones Merritt for this note's accidentally derivative title. See Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563 (1994). But see ROBERT M. HUTCHINS, TWO FACES OF FEDERALISM: AN OUTLINE OF AN ARGUMENT ABOUT PLURALISM, UNITY, AND THE LAW (1961); Lea Brilmayer & Ronald D. Lee, *State Sovereignty and the Two Faces of Federalism: A Comparative Study of Federal Jurisdiction and the Conflict of Laws*, 60 NOTRE DAME L. REV. 833 (1985); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Jurisprudence*, 73 S. CAL. L. REV. 741 (2000); Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990); Antonin Scalia, *The Two Faces of Federalism*, 6 HARV. J.L. & PUB. POL'Y 19 (1982); Mark Strasser, *DOMA and the Two Faces of Federalism*, 32 CREIGHTON L. REV. 457 (1998).

## I. INTRODUCTION

Common wisdom says that the five conservative Justices on the current Supreme Court are unified in favor of enhanced state power. This note demonstrates the superficiality of this unity. In particular, although the five conservative Justices almost unfailingly manage to cobble together their signatures to achieve the result of enhanced state power—against the unfailing dissent of the four more liberal Justices—there is little agreement among the conservative Justices on the theoretical basis for enhancing state power.

The current United States Supreme Court has decided at least eleven cases with major federalism implications.<sup>1</sup> Ten of these cases were decided in favor of increased state sovereign power.<sup>2</sup> Each of these eleven cases divided the Court into the same five-four split—Chief Justice Rehnquist, and Justices O'Connor, Kennedy, Scalia, and Thomas in the majority, and Justices Stevens, Souter, Ginsburg, and Breyer in the dissent. The anomaly is *U.S. Term Limits v. Thornton*,<sup>3</sup> which goes against state sovereignty due to Justice Kennedy's concurrence with the normally opposing camp.

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<sup>1</sup> Although Justice O'Connor has called federalism "perhaps our oldest question of constitutional law," *New York v. United States*, 505 U.S. 144, 149 (1992), it has not lost its vitality with age. "[T]here is no disputing that the current Supreme Court is more interested than any Court in recent history in reexamining and reconsidering 'first principles' of our federal system. This renaissance of an interest in federalism may mark yet another significant period in American constitutional history." Richard E. Levy & Stephen R. McAllister, *Defining the Roles of the National and State Governments in the American Federal System: A Symposium*, 45 U. KAN. L. REV. 971, 973 (1997) (internal citation omitted). "After more than fifty years spent largely on the sidelines, the Court has reentered the fray, seeking to enforce a commitment to federalism on several fronts . . ." H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 850 (1999). As Professor Edward Rubin has said, "Federalism is indeed worth discussing; it is a basic, truly fundamental question of political organization." Edward L. Rubin, *The Fundamentality and Irrelevance of Federalism*, 13 GA. ST. U. L. REV. 1009, 1010 (1997).

Justice O'Connor uncontroversially described federalism as a "question as old as the Constitution: It consists of discerning the proper division of authority between the Federal Government and the States." *New York*, 505 U.S. at 149.

<sup>2</sup> *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (2001), discussed *infra* Part II.K; *United States v. Morrison*, 529 U.S. 598 (2000), discussed *infra* Part II.J; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000), discussed *infra* Part II.I; *Alden v. Maine*, 527 U.S. 706 (1999), discussed *infra* Part II.H; *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), discussed *infra* Part II.G; *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627 (1999), discussed *infra* Part II.F; *Printz v. United States*, 521 U.S. 898 (1997), discussed *infra* Part II.E; *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), discussed *infra* Part II.D; *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), discussed *infra* Part II.C; *United States v. Lopez*, 514 U.S. 549 (1995), discussed *infra* Part II.A.

<sup>3</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), discussed *infra* Part II.B.

These eleven federalism cases contain thirty-eight opinions. The contrast between the consistency in results and the diversity in opinions is stunning. This contrast suggests that the ongoing battle in the Court to determine the appropriate balance between state power and national power is not being waged between two philosophically unified camps. Rather, as this note argues, these federalism cases are decided based on a partial convergence of diverse philosophies of federalism. A corollary of this conclusion is that the emergent federalist theory behind any one of these decisions will not necessarily be the same as the emergent federalist theory behind another. Thus, to truly understand the current Court's federalism jurisprudence, it is necessary to look beyond the majority opinions of the Court and to analyze the diversity of theories. This will result in an understanding of how the theories differ and where they converge, thus making sense of the differing emergent theories represented in specific cases.<sup>4</sup>

The goal of this note is not to argue for any particular view of federalism; such arguments abound elsewhere.<sup>5</sup> Rather, this note argues that, although the five conservative Justices are managing to come together into a five-four majority in favor of increased state power on almost every federalism case, their individual federalist theories conflict intensely. Therefore, the five-member state-

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<sup>4</sup> This project is parallel to, but importantly different from, that of Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993). Not only did that article look at a different set of Justices, but, more importantly, it examined the convergence of divergent *normative* theories of federalism. In contrast, the purpose of this note is to examine the convergence of divergent *descriptive* theories of federalism. Normative federalism addresses the purposes of federalism; descriptive federalism discerns what federalist structure is dictated by the Constitution.

<sup>5</sup> For some recent arguments, see, e.g., Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447 (1995); Daniel A. Farber, *The Constitution's Forgotten Cover Letter: An Essay on the New Federalism and the Original Understanding*, 94 MICH. L. REV. 615 (1995); Laura S. Fitzgerald, *Beyond Marbury: Jurisdictional Self-Dealing in Seminole Tribe*, 52 VAND. L. REV. 407 (1999); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180 (1998); Deborah Jones Merritt, *The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems*, 66 GEO. WASH. L. REV. 1206 (1998); Moulton, *supra* note 1; H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993); Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819 (1999); Donald H. Regan, *How to Think about the Federal Commerce Power and Incidentally Rewrite United States v. Lopez*, 94 MICH. L. REV. 554 (1995); John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27 (1998); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

power wing of the Court does not itself have a unified theory of federalism on which the several increases in state power are based.<sup>6</sup> Rather, these Justices repeatedly cobble together their five-member majority while, in concurring opinions, arguing with each other about the bases of the decisions.

Part II sets the stage for the examination of these arguments by outlining the cases in question. Part III looks at each Justice in the state-power quintet individually, and argues, based on the evidence of the several opinions in the cases, for conclusions of what each of these Justices' theory of federalism is, and how it differs from the other Justices' theories. Finally, Part IV briefly considers the theories together, and makes some concluding observations about why this tangle of theories—resulting in this lack of a unified federalist theory behind the Supreme Court's cases—while disturbing, should not be surprising.

## II. THE CASES

This part gives brief synopses of each of the eleven cases mentioned above,<sup>7</sup> focusing on their importance to the federalism battle, along with an introductory sketch of the various philosophies of federalism represented in each case's state-power opinions. This part culls the federalist import of the cases themselves, before digging into an analysis of each majority Justice's philosophy of federalism throughout the cases.

### A. *United States v. Lopez*

In 1990, Congress passed the Gun-Free School Zones Act of 1990.<sup>8</sup> This Act made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone."<sup>9</sup> In *United States v. Lopez* the Court struck down the Act as unconstitutional.<sup>10</sup> The principal basis of the majority opinion was that the Act

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<sup>6</sup> "The [federalism] decisions are inconsistent . . . with one another, and they lack a persuasive normative theory to . . . resolve [this inconsistency]." Bednar & Eskridge, *supra* note 5, at 1447.

<sup>7</sup> See *supra* notes 2–3.

<sup>8</sup> 18 U.S.C. § 922(q) (Supp. V 1993).

<sup>9</sup> § 922(q)(1)(A).

<sup>10</sup> *United States v. Lopez*, 514 U.S. 549, 552 (1995) (affirming the Fifth Circuit's striking down of the Act). "*Lopez* was the first time since *Carter v. Carter Coal Co.*, [298 U.S. 238 (1936)], decided fifty-nine years before—in the spring of 1936, the fourth year of Franklin Roosevelt's first term—that the Court held that Congress had passed a law that exceeded its authority under the Commerce Clause." Judge Louis H. Pollak, *Foreword*, 94 MICH. L. REV. 533, 535 (1995).

was an invalid attempt by Congress to use its Commerce Clause power.<sup>11</sup> The federalism issue here was the proper scope of federal powers and state powers. That is, the question was whether the type of act outlawed by the Gun-Free School Zones Act is one that is within the power of the federal government, or whether it is instead one exclusively within the power of the state governments.

The Commerce Clause has been long used by Congress to regulate activity within states, and the states have long fought federal Commerce Clause regulation of activities within their borders.<sup>12</sup> A result of this battle is what Justice Thomas calls the Supreme Court's "substantial effects" test for whether Congress has legitimately used its Commerce Clause power.<sup>13</sup> That is, the Court does not read the Clause strictly to limit Congress's power to regulate commerce only "among the several States." Rather, federal regulation founded on this clause is not *ultra vires* if the regulated activity "substantially affects" interstate commerce.<sup>14</sup>

Chief Justice Rehnquist's majority opinion held that the power to criminalize possession of handguns within school zones is outside the scope of federal power. According to this opinion, the federal government was attempting to usurp state power by regulating a type of activity that the Constitution puts exclusively within the states' sphere of power. The substantial effects test is, of course, a fuzzy test open to diverse interpretation. The majority drew the substantial effects line so as not to include handgun possession in school zones, and its reason seemed to be a fear that the line has to be drawn *somewhere*, or else our federalist system would be destroyed. The majority was worried that if it did not put some limit on Commerce Clause power, the clause would

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<sup>11</sup> *Id.* The Commerce Clause is found at U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .").

<sup>12</sup> See GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 141–227 (13th ed. 1997).

<sup>13</sup> *Lopez*, 514 U.S. at 584 (Thomas, J., concurring); see also *id.* at 615–16 (Breyer, J., dissenting) (noting Justice Breyer's acquiescence in the use of this label for the purposes of this case). Justice Breyer points out that the precedential cases have not consistently used the "substantial effects" language: "I use the word 'significant' because the word 'substantial' implies a somewhat narrower power than recent precedent suggests . . . . But to speak of 'substantial effect' rather than 'significant effect' would make no difference in this case." *Id.* at 616 (internal citations omitted).

<sup>14</sup> As discussed more fully *infra* Part III.E, Justice Thomas thinks the substantial-effects test gives Congress too much power: "[W]e must . . . respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce." *Lopez*, 514 U.S. at 593 (Thomas, J., concurring). In fact, he believes the substantial effects test removes all limits on congressional power: "Under our jurisprudence, if Congress passed an omnibus 'substantially affects interstate commerce' statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional." *Id.* at 600 (Thomas, J., concurring).

“effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”<sup>15</sup>

Justice Thomas, in a concurring opinion, expressed his desire to overrule the Court’s opinions that led to its substantial effects test.<sup>16</sup> In his view, this test, rather than limiting federal power, actually removes all limits on federal power and “grant[s] Congress a police power over the Nation.”<sup>17</sup> He sees the current test as “but an innovation of the 20th century”<sup>18</sup> and would prefer to return to what he sees as the “original understanding” of the Commerce Clause.<sup>19</sup> This original understanding, he argued, limits the clause to its literal text, as understood at the time of ratification, in the context of interstate commerce as it existed at the time of ratification. The Clause, he claims, properly grants Congress power to regulate only the actual trafficking of merchandise across state borders.<sup>20</sup>

Justice Kennedy also wrote a concurring opinion joined by Justice O’Connor. They appeared to barely agree with the majority.<sup>21</sup> They highlighted the fundamental difference between our nation’s economic system today and at the time of constitutional ratification. They urged that the Court’s difficulty in generating a single Commerce Clause test to account for this change “counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power.”<sup>22</sup> This emphasis on the crucial changes in commerce that have taken place since ratification was presumably a response to Justice Thomas’s desire to all but ignore these factual changes in a

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<sup>15</sup> *Lopez*, 514 U.S. at 557 (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

<sup>16</sup> “Presumably, Justice Thomas would overrule *United States v. Darby* [, 312 U.S. 100 (1941),] and other decisions interpreting the Commerce Clause to allow the federal government effectively to exercise a police power over the states.” Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 HARV. L. REV. 78, 106–07 (1995).

<sup>17</sup> *Lopez*, 514 U.S. at 600 (Thomas, J., concurring).

<sup>18</sup> *Id.* at 596 (Thomas, J., concurring).

<sup>19</sup> *Id.* at 584 (Thomas, J., concurring).

<sup>20</sup> “Commerce,” as understood two hundred years ago, did not include manufacturing or agriculture. *Id.* at 585–593 (Thomas, J., concurring).

<sup>21</sup> They stated that the decision gave them “pause,” that the Court should exercise “great restraint” in this area, that the principal holding is “limited,” *id.* at 568 (Kennedy, J., concurring), that “the intrusion on state sovereignty may not be as severe in this instance as in some of [their] recent Tenth Amendment cases,” *id.* at 583 (Kennedy, J., concurring), and they even expressed support for the policy behind the law that they struck down. *Id.* at 581 (Kennedy, J., concurring).

<sup>22</sup> *Id.* at 568 (Kennedy, J., concurring).

return to the "original understanding" of the Clause.<sup>23</sup> They wrote to emphasize that, though the holding in *Lopez* was "necessary," it was also "limited."<sup>24</sup> They discussed at length the importance of maintaining a "balance" between national and state power, apparently in opposition to Justice Thomas's desire to swing that balance much more toward the states.<sup>25</sup> Most important to them was their point that this federal-state balance should be left largely to the political system. The judiciary, they argued, should not intervene to declare absolutely where this divide in power should be, unless truly "one or the other level of Government has tipped the scales too far."<sup>26</sup> Thus, Justices Kennedy and O'Connor believe that, although the Gun Free School Zones Act did tip the scales of power too far toward the federal government, the Court ought usually to avoid Commerce Clause cases and, instead, to accord Congress "substantial discretion and control over the federal balance."<sup>27</sup>

*Lopez* is thus a rich source of ideological dispute among the five Justices making up the majority in most of the current Court's federalism cases. It is especially apparent in this case how starkly opposed Justice Thomas is to Justices Kennedy and O'Connor regarding the proper federal-state balance under the Commerce Clause and the proper means of determining that balance. Divergent as these theories of federalism are, they nevertheless converge enough to create federalist jurisprudence through specific cases such as *Lopez*. The divergence and convergence of these individual theories will be analyzed more thoroughly below.<sup>28</sup> The next case to enter into this analysis, however, quickly complicates the landscape.

#### B. U.S. Term Limits, Inc. v. Thornton

Although *U.S. Term Limits, Inc. v. Thornton*<sup>29</sup> complicates the analysis, it also makes the analysis much more interesting. *Term Limits*, decided less than a month after *Lopez*, came down in favor of national power and limited state power

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<sup>23</sup> *Id.* at 584 (Thomas, J., concurring).

<sup>24</sup> *Id.* at 568 (Kennedy, J., concurring).

<sup>25</sup> "Justice Thomas's concurrence would have pushed the Court's majority much farther . . . . Implicit in Justice Thomas's opinion . . . is a standard that would invalidate many comprehensive congressional enactments whose constitutionality is scarcely controversial, including federal civil rights statutes, the antitrust laws, and the Fair Labor Standards Act." Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2227-28 (1996).

<sup>26</sup> *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

<sup>27</sup> *Id.* at 577 (Kennedy, J., concurring).

<sup>28</sup> See *infra* Part III.

<sup>29</sup> 514 U.S. 779 (1995).

due to Justice Kennedy joining the usually opposing camp. It is the only major federalism case decided by the currently sitting Supreme Court to be resolved against states. It thus stands as an indication of certain limits on the Court's shift toward state power.

*Term Limits* can be distinguished from *Lopez* in that it did not involve a federal attempt to grab power, but rather a state attempt. Also, it implicated not the Commerce Clause but the Qualifications Clauses.<sup>30</sup> However, both cases involved strong debate over the proper balance of federal and state powers under the Constitution.

*Term Limits* struck down as unconstitutional an amendment to the Arkansas State Constitution that imposed term limits on the state's candidates for the United States Congress.<sup>31</sup> The majority opinion, written by Justice Stevens and joined by, among others,<sup>32</sup> Justice Kennedy, held that the power to impose qualifications on congressional candidates is solely within the federal government's sphere of power, and outside of state governments' sphere of power. The Court's fundamental constitutional basis for this result was its interpretation of the Tenth Amendment, which reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."<sup>33</sup> The focus of the dispute was the word "reserved." "First, we conclude that the power to add qualifications is not within the 'original powers' of the states, and thus is not reserved to the States by the Tenth Amendment."<sup>34</sup> The majority's view, then, is that for a power to be "reserved" to the States, it must have already been in the states at the time of unification. The Tenth Amendment, under this interpretation, allows the states to keep the powers that the Constitution did not take from them, but it does

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<sup>30</sup> The Qualifications Clauses are: U.S. CONST. art. I, § 2, cl. 2 ("No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); U.S. CONST. art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen."); U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the . . . Qualifications of its own Members.").

<sup>31</sup> ARK. CONST. amend. 73, § 3, *amended by* ARK. CONST. amend. 76 (1996). In particular, Amendment 73 made the term limits a barrier to ballot access for otherwise eligible candidates for Congress. Write-in candidates could win despite having served beyond the term limits.

<sup>32</sup> Justice Stevens's opinion was joined by Justices Souter, Breyer, Ginsberg, and Kennedy. *Term Limits*, 514 U.S. at 781.

<sup>33</sup> U.S. CONST. amend. X.

<sup>34</sup> *Term Limits*, 514 U.S. at 800.



not itself place any new powers in the states. The Tenth Amendment “could only ‘reserve’ that which existed before.”<sup>35</sup>

Prior to unification, the majority reasoned, because there was no Congress and thus were no congressional candidates, there was no power to impose qualifications on the candidates.<sup>36</sup> Therefore, necessarily, the states did not possess such a power, and the Tenth Amendment cannot have “reserved” it to them.

Justice Thomas, in his dissent,<sup>37</sup> took issue with the majority’s interpretation of the Tenth Amendment. He took the polar opposite view that the “reserved” language is an affirmative grant of powers to the states, rather than a means of allowing them to keep their remaining pre-unification powers.<sup>38</sup> His opinion, then, is that the state sphere of power is universal except where power is explicitly taken away from states by the Constitution.<sup>39</sup> Therefore, even though it may be true that, prior to unification, there was no power in *anyone* to impose qualifications on congressional candidates, the states now have this power because the constitution does not clearly say they do not have it.<sup>40</sup>

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<sup>35</sup> *Id.* at 802.

<sup>36</sup> *Id.* at 803 (“With respect to setting qualifications for service in Congress, no such right existed before the Constitution was ratified.”).

<sup>37</sup> Note that this is the only federalism opinion written by Justice Thomas that is joined by any other Justice. (He is joined by Chief Justice Rehnquist and Justices Scalia and O’Connor). *Id.* at 781. It is not coincidental that this anomaly is coupled with the anomaly that these Justices are in dissent on a federalism case. As this note will demonstrate, Justice Thomas’s vision of federalism is too extreme on the side of state power for any other Justice to help make it law. See *infra* Part III.E.

<sup>38</sup> See *Term Limits*, 514 U.S. at 846 (Thomas, J., dissenting) (opining that “the majority fundamentally misunderstands the notion of ‘reserved’ powers”).

<sup>39</sup> Professor Sullivan aptly called this view “a declaration of the primordial sovereignty of the states.” Sullivan, *supra* note 16, at 109. Charles Fried described the first part of Justice Thomas’s dissent as involving a:

perhaps too exuberant, celebration . . . of the priority of state over national citizenship and [a] correspondingly heterodox claim that the “people” who formed the United States were the people of the several states considered as clumped collectivities, rather than the people of the newly constructed whole . . . . Perhaps the most startling thing—coming closest to revolutionary—about the dissent is that four Justices were willing to sign on to the original manifesto of part I.A.

Charles Fried, *Foreword: Revolutions?* 109 HARV. L. REV. 13, 14–15 (1995) (internal citations omitted).

<sup>40</sup> Another locus of disagreement in *Term Limits* was the language of the Qualifications Clauses themselves. See *supra* note 30 for these Clauses. The majority argued from historical record that, regardless of the Tenth Amendment, the framers’ “original intent” was to make the Qualifications Clauses exhaustive. That is, the Clauses were intended to describe all of the

Most interesting for this note's purpose is Justice Kennedy's concurring opinion,<sup>41</sup> in which he revealed why he split from his usual state-power majority to create a federal-power majority in this case. The question in this case, he wrote, is answered by the republican character of our federalist system. In particular, the relationship between the people and their representatives in the federal government is purely within the federal government's sphere of power, and thus cannot be interfered with by states. He was opposed to his usual state-power allies, he explained, because their "course of reasoning . . . might be construed to disparage the republican character of the National Government."<sup>42</sup> The "course of reasoning" he referred to was the dissent's challenge of the "well settled" notion that the federal system was created by the American people as a whole, "assert[ing] their political identity and unity of purpose," and not by or through the states.<sup>43</sup> The dissent's challenge of this precept, he said, "runs counter to fundamental principles of federalism."<sup>44</sup> Justice Kennedy was apparently concerned with maintaining the essential duality of the federalist system.<sup>45</sup> For him, the republican relationship between the people as citizens of the United States and their elected federal government is an essential pillar on the national side of this federalist duality. He believes that just as our federalist system requires spheres of state power inviolable by the national government, the republican relationship between the people and their congressional representatives is one of the necessary limits on state power.

Justice Kennedy argues (as do all the Justices) that the dual sovereignty of our federal system, and our concomitant individual dual capacities as citizens of

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qualifications for congressional candidates, and therefore, by implication, the states are prohibited from adding qualifications. As the Court wrote, "even if States possessed some original power in this area, we conclude that the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby 'divested' States of any power to add qualifications." *Term Limits*, 514 U.S. at 800–01. Justice Thomas, too, looked at the historical record, but of course came to the opposite conclusion about the framers' original intent. He argued that the Qualifications Clauses were intended as mere minimum prerequisites for congressional candidacy: "the Framers did not want the people of the States and their state legislatures to be constrained by too many qualifications imposed at the national level," *Term Limits*, 514 U.S. at 875 (Thomas, J., dissenting), and that therefore the states are free to add qualifications as they see fit.

<sup>41</sup> *Term Limits*, 514 U.S. at 838–45 (Kennedy, J., concurring).

<sup>42</sup> *Id.* at 838 (Kennedy, J., concurring).

<sup>43</sup> *Id.* (Kennedy, J., concurring).

<sup>44</sup> *Id.* (Kennedy, J., concurring).

<sup>45</sup> "Justice Kennedy alone sees the Court's role in federalism disputes as a two-way ratchet, stopping the states from 'invad[ing] the sphere of federal sovereignty' but also holding the federal government 'within the boundaries of its own power when it intrudes upon matters reserved to the States.'" Sullivan, *supra* note 16, at 103 (quoting *Term Limits*, 514 U.S. at 841 (Kennedy, J., concurring)).

two sovereigns, are crucial for avoiding a single tyrannical government.<sup>46</sup> Though he agrees with the state-power Justices on this issue, he believes that they are wrong to assert that the people's national political identity is separate and independent of their state political identity. These separate, independent, political identities are fundamental to Justice Kennedy's view of federalism.

### C. Seminole Tribe v. Florida

In 1996, *Seminole Tribe v. Florida*<sup>47</sup> reunified the state-power wing of the Supreme Court, after Justice Kennedy's brief foray to the opposing camp in *Term Limits*. As in most of the other five-four Eleventh Amendment sovereign immunity cases considered in this note,<sup>48</sup> the five state-power Justices were locked in unison in *Seminole Tribe*. In only the two most recent of these cases did any Justice express even a reservation in a concurring opinion.<sup>49</sup>

*Seminole Tribe* held that Congress violated the Eleventh Amendment in enacting the Indian Gaming Regulatory Act.<sup>50</sup> Although the Amendment does not expressly say so,<sup>51</sup> the Court held that the Amendment supports a limited sovereign immunity in a state against suit by its citizens. Such immunity, Chief Justice Rehnquist reasoned, is "inherent in the nature of sovereignty."<sup>52</sup> Indeed, this follows easily from the Court's claim that total immunity from suit by any individual is inherent in the nature of sovereignty. The Chief Justice believes, of

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<sup>46</sup> For an interesting argument against this dogmatically and nearly universally held theory, see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 909, 927-35 (1994) (arguing that "federalism does not diffuse power in our system, but may actually act as an impediment to its diffusion").

<sup>47</sup> 517 U.S. 44 (1996).

<sup>48</sup> See *infra* Parts I.F-I, K (discussing respectively: Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627 (1999); Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); and Alden v. Maine, 527 U.S. 706 (1999); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); Bd. of Trs. of the Univ. of Ala. v. Garrett, 121 S. Ct. 955 (2001)).

<sup>49</sup> Note, however, that the sovereign immunity majority does break down when it comes to *Ex parte Young* jurisdiction. See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), discussed *infra* Part II.D.

<sup>50</sup> Pub. L. No. 100-497, § 11, 102 Stat. 2467, 2475-79 (1988) (codified at 25 U.S.C. § 2710(d) (1994)).

<sup>51</sup> The Eleventh Amendment reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

<sup>52</sup> *Seminole Tribe*, 517 U.S. at 54 (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting THE FEDERALIST No. 81, at 487 (A. Hamilton) (C. Rossiter ed. 1961))).

course, that states, though limited in the scope of their sovereign powers, retain this aspect of sovereignty.

Furthermore, Chief Justice Rehnquist reasoned, the framers did not intend the Constitution to grant "federal jurisdiction over suits against unconsenting States."<sup>53</sup> He then considered Congress's power to abrogate this Eleventh Amendment sovereign immunity: "Was the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?"<sup>54</sup> The Act in question was ostensibly enacted pursuant to the Indian Commerce Clause.<sup>55</sup> His conclusion was that, although the Indian Commerce Clause grants the federal government exclusive power over regulation of Indian commerce, this alone is not enough to give Congress authority to abrogate state sovereign immunity. In fact, in *Seminole Tribe*, the only constitutional provision that Chief Justice Rehnquist clearly said grants Congress power to abrogate state sovereign immunity is Section 5 of the Fourteenth Amendment, the Enforcement Clause.<sup>56</sup> This is because "the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution."<sup>57</sup> *Seminole Tribe* also overruled the Court's only previous case upholding non-Section-5 congressional abrogation of state sovereign immunity.<sup>58</sup> Therefore, although the Court did not come out and say it, *Seminole Tribe* strongly suggests that, under the current state-power quintet, Section 5 of the Fourteenth Amendment is the only legitimate basis for congressional abrogation of state sovereign immunity.

#### D. Idaho v. Coeur d'Alene Tribe

*Idaho v. Coeur d'Alene Tribe*<sup>59</sup> once again splintered the five-member state-power majority, though they still managed to agree enough to squeeze by another five-four decision. The official majority opinion is contained in parts I, II(A), and III of Justice Kennedy's opinion.<sup>60</sup> On the other hand, as Justice Souter's

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<sup>53</sup> *Id.*.

<sup>54</sup> *Id.* at 59.

<sup>55</sup> U.S. CONST. art. I, § 8, cl. 3 (giving the Congress power to "regulate Commerce . . . with the Indian Tribes").

<sup>56</sup> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

<sup>57</sup> *Seminole Tribe*, 517 U.S. at 59 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

<sup>58</sup> *See id.* at 66 (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)).

<sup>59</sup> 521 U.S. 261 (1997).

<sup>60</sup> *Id.* at 263–70, 281–88.

dissenting opinion points out,<sup>61</sup> it appears that the de facto controlling result is Justice O'Connor's opinion (concurring in part and concurring in the judgment, joined by Justices Scalia and Thomas).<sup>62</sup>

*Coeur d'Alene Tribe* principally concerns *Ex parte Young* jurisdiction. Under the *Young* doctrine, even when the Eleventh Amendment bars suit, federal courts have jurisdiction to hear a complaint for purely prospective injunctive relief against a state officer.<sup>63</sup> The plaintiff tribe in *Coeur d'Alene Tribe* attempted to get *Ex parte Young* jurisdiction to enjoin state officers "from regulating, permitting, or taking any action in violation of the Tribe's rights of exclusive use and occupancy, quiet enjoyment, and other ownership interest in [certain] submerged lands" held by the state.<sup>64</sup> The majority opinion denied such jurisdiction to the plaintiff. The basis for its denial was that, although the complaint was formally within the requirements of the *Young* doctrine, in substance it was the functional equivalent of a quiet title claim directly against the state. A quiet title action against a state over submerged lands is, according to the majority, barred by Eleventh Amendment sovereign immunity. To allow a plaintiff to avoid the Eleventh Amendment through crafty pleading alone, "would be to adhere to an empty formalism."<sup>65</sup>

So far as this reasoning goes, Justices O'Connor, Scalia, and Thomas are in agreement. However, in parts II(B)–(D) of Justice Kennedy's opinion, he and Chief Justice Rehnquist go off on their own.<sup>66</sup> It is interesting to note that their vision of federalism as it relates to *Ex parte Young* jurisdiction is apparently too much in favor of state power for even Justice Thomas. This observation illuminates yet another complexity in the interaction of these five Justices' individual theories of federalism.

Parts II(B)–(D) of Justice Kennedy's opinion<sup>67</sup> present the position that *Ex parte Young* jurisdiction should be further limited by the fact that state courts are capable of determining federal questions:

A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism . . . .

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<sup>61</sup> *Id.* at 298 (Souter, J., dissenting).

<sup>62</sup> *See id.* at 288–97 (O'Connor, J., concurring in part and concurring in the judgment). This appears to be the controlling result because, as will become clear, the basis for this opinion is more limited than that for Justice Kennedy's, yet the result in this case is the same.

<sup>63</sup> *See Ex parte Young*, 209 U.S. 123 (1908).

<sup>64</sup> *Coeur d'Alene Tribe*, 521 U.S. at 265.

<sup>65</sup> *Id.* at 270.

<sup>66</sup> *Id.* at 270–80.

<sup>67</sup> *Id.*

... It is the right and duty of the States, within their own judiciaries, to interpret and to follow the Constitution and all laws enacted pursuant to it, subject to a litigant's right of review in this Court in a proper case.<sup>68</sup>

In Justice Kennedy's view, the state-power side of federalism requires a case-by-case balancing test when *Ex parte Young* jurisdiction is otherwise satisfied. He thinks that state interests, and especially states' interests in having claims against them decided in their own state courts, should limit federal courts' application of *Ex parte Young* jurisdiction. He is not clear about how to apply this doctrine, but what is clear is that Justices O'Connor, Scalia, and Thomas will not go that far in favor of state power.

In Justice O'Connor's view, *Ex parte Young* jurisdiction should not be eroded by a case-by-case analysis of particular state interests.<sup>69</sup> On the other hand, she did agree that the Eleventh Amendment barred the *Coeur d'Alene Tribe* case because, though the action formally invoked the *Young* doctrine, it was in substance equivalent to a suit barred by the Eleventh Amendment.<sup>70</sup> In her view, "the principal opinion unnecessarily questions [the] basic principle of federal law" that the Eleventh Amendment does not bar a plaintiff from seeking prospective relief to end an ongoing violation of federal rights.<sup>71</sup> She wrote that the Court's precedent "simply does not support the proposition that federal courts must evaluate the importance of the federal right at stake before permitting an officer's suit to proceed."<sup>72</sup>

To make a preliminary observation, *Coeur d'Alene Tribe* is valuable to the present investigation because it shows an area where the unity among the state-power quintet breaks down even on the issue of Eleventh Amendment state sovereign immunity. Here, we also see Justice Kennedy going further than Justice Thomas in favor of state power, whereas the opposite seemed to be the case in both *Term Limits* and *Lopez*. Of course, these paradoxes are explainable,<sup>73</sup> but they again illustrate the complexity and lack of basic theoretical unity among the five-member state-power majority.

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<sup>68</sup> *Id.* at 275.

<sup>69</sup> *Id.* at 291 (O'Connor, J., concurring).

<sup>70</sup> *Id.* (O'Connor, J., concurring).

<sup>71</sup> *Id.* at 293 (O'Connor, J., concurring).

<sup>72</sup> *Id.* at 295 (O'Connor, J., concurring).

<sup>73</sup> See *infra* Part IV.

E. *Printz v. United States*

In *Printz v. United States*<sup>74</sup> we return to attempted gun regulation under the Commerce Clause, but the majority is again splintered. Although all four of the other state-power Justices joined Justice Scalia's majority opinion,<sup>75</sup> Justices O'Connor and Thomas expressed their reservations in solo concurring opinions.<sup>76</sup>

*Printz* struck down temporary provisions of the Brady Handgun Violence Prevention Act<sup>77</sup> that required state and local officers to carry out certain background-check procedures that would later be carried out by federal officers. Justice Scalia's majority opinion held that "such commands are fundamentally incompatible with our constitutional system of dual sovereignty."<sup>78</sup> He based this conclusion on an original-understanding argument, the "structure of the Constitution," and the Court's precedent. Based on his analysis of history of early congressional enactments, Justice Scalia concluded that there was no "assumption that the Federal Government may command the States' executive power in the absence of a particularized constitutional authorization."<sup>79</sup> The Court has held in several cases, he further stated, that the federal government does not have this power.<sup>80</sup>

Most interesting for this note's purposes is Justice Scalia's reasoning based on the federalist structure created by the Constitution. He started with the common principle that our liberty is protected by the creation of dual sovereigns, thus making the proper balance of power between these sovereigns of the utmost importance.<sup>81</sup> The framers, he continued, "rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people."<sup>82</sup> Therefore, because Congress, through the temporary provisions of the Brady Act, was attempting to act through the states, these provisions were in opposition to the federalist structure embodied in the

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<sup>74</sup> 521 U.S. 898 (1997).

<sup>75</sup> *Id.* at 902–35.

<sup>76</sup> *Id.* at 935–36 (O'Connor, J., concurring); *id.* at 936–39 (Thomas, J., concurring).

<sup>77</sup> Pub. L. No. 103-159, § 102, 107 Stat. 1536, 1536–39 (1993) (codified at 18 U.S.C. § 922(s) (1994)).

<sup>78</sup> *Printz*, 521 U.S. at 935.

<sup>79</sup> *Id.* at 909.

<sup>80</sup> *Id.* at 926. The cases he cited include: *New York v. United States*, 505 U.S. 144 (1992); *FERC v. Mississippi*, 456 U.S. 742 (1982); and *Testa v. Katt*, 330 U.S. 386 (1947).

<sup>81</sup> *But see* Rubin & Feeley, *supra* note 46, at 909, 927–35.

<sup>82</sup> *Printz*, 521 U.S. at 919–20.

Constitution. If the federal government were allowed to act through the states like this, Justice Scalia declared, the "power of the Federal Government would be augmented immeasurably."<sup>83</sup>

Justice O'Connor agreed with the basic reasoning and conclusion of the principal opinion.<sup>84</sup> However, she briefly suggested three other interesting positions she advocates. First, she suggested that she would support the permanent provisions of the Brady Act. Second, she suggested that she would support a reenactment of the invalidated interim provisions if they were structured as conditions for state receipt of federal funds rather than as absolute directives. This is noteworthy because Justice Scalia suggested obliquely in his opinion that he might not uphold such a provision.<sup>85</sup> Finally, Justice O'Connor suggested that she was not opposed to the Act's "purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to the Commerce Clause powers."<sup>86</sup> These statements all hinted at limits on the Court's ability to attract a majority on other issues of state-power.

Justice Thomas added a concurring opinion expressing where his federalist vision diverges from the majority's. First, he emphasized his always-strict reading of the Tenth Amendment. He would read the Amendment to grant states all powers that are not specifically given to the federal government by the Constitution.<sup>87</sup> Second, he reemphasized his desire to reduce Commerce Clause power. And, in particular, Justice Thomas suggested that he would strike down the entire Brady Act as beyond the boundaries of his interpretation of the Commerce Clause power.<sup>88</sup> These suggestions of Justice Thomas reveal again how far his Commerce Clause views go in favor of state power.

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<sup>83</sup> *Id.* at 922.

<sup>84</sup> *Id.* at 935-36 (O'Connor, J., concurring).

<sup>85</sup> *Id.* at 917-18.

<sup>86</sup> *Id.* at 936 (O'Connor, J., concurring).

<sup>87</sup> *Id.* at 936-37 (Thomas, J., concurring); *see also supra* note 39 (quoting commentary on this view).

<sup>88</sup> *Printz*, 521 U.S. at 936-39. Justice Thomas not so subtly suggested that he would also strike down the Act based on the Second Amendment. That is, he would like to read the Second Amendment as granting an individual right, contrary again to the Court's precedent. *See United States v. Miller*, 307 U.S. 174, 178 (1939) (holding that the Second Amendment's purpose is to give Congress power "to assure the continuation and render possible the effectiveness of" government militias).



F. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank

The next three cases were all decided on the same day by a unified state-power quintet. In some respect, each increases state sovereign immunity, but not necessarily based on the Eleventh Amendment. *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*<sup>89</sup> struck down the Patent and Plant Variety Protection Remedy Clarification Act<sup>90</sup> insofar as it purported to abrogate states' sovereign immunity in federal court from citizen claims of patent infringement.

Chief Justice Rehnquist gave a strong reading to *Seminole Tribe*: "*Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause."<sup>91</sup> However, the Fourteenth Amendment remains as a means to abrogate state immunity.<sup>92</sup> Fourteenth Amendment abrogation, however, must satisfy the standard set out in *City of Boerne v. Flores*.<sup>93</sup> "for Congress to invoke § 5 [of the Fourteenth Amendment], it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."<sup>94</sup> The Chief Justice held that this requirement was not met because Congress failed to show a widespread problem of states violating patents.<sup>95</sup> Furthermore, the Court held that even had Congress shown this, it would have had to show additionally that this deprivation of property was without due process of law.<sup>96</sup> Otherwise, the Fourteenth Amendment was not being violated. This was not shown either, the Court said,

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<sup>89</sup> 527 U.S. 627 (1999). The reader should take care not to confuse this case with its other half, discussed in Part III.G.

<sup>90</sup> Pub. L. No. 102-560, § 2, 106 Stat. 4230 (1992) (codified at 35 U.S.C. § 296 (1994)).

<sup>91</sup> *Florida Prepaid*, 527 U.S. at 636 (referring to *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)).

<sup>92</sup> *Id.* at 636–37 ("While reaffirming the view that state sovereign immunity does not yield to Congress' Article I powers, this Court in *Seminole Tribe* also reaffirmed its holding in *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), that Congress retains the authority to abrogate state sovereign immunity pursuant to the Fourteenth Amendment.").

<sup>93</sup> 521 U.S. 507, 519–20 (1997).

<sup>94</sup> *Florida Prepaid*, 527 U.S. at 639. See generally Brian Ray, "Out the Window"? Prospects for the EPA and FMLA after *Kimel v. Florida Board of Regents*, 61 OHIO ST. L.J. 1755 (2000) (providing, inter alia, a good elaboration of the *Boerne* "congruence and proportionality test" for appropriate tailoring of legislative schemes under Section 5).

<sup>95</sup> *Id.* at 640.

<sup>96</sup> *Id.* at 642–43.

because Congress “barely considered the availability of state remedies for patent infringement.”<sup>97</sup>

The upshot of this holding is that even if states are violating citizens’ Fourteenth Amendment rights, Congress is powerless to subject the states to citizen suits in federal court for this violation unless it can show a “history of ‘widespread and persisting deprivation of’” these rights.<sup>98</sup> Apparently, citizens are powerless to protect their federal Fourteenth Amendment rights in federal court—because Congress is powerless to give the courts jurisdiction to protect such citizens—unless Congress shows that states’ violation of particular constitutional rights has become ubiquitous. This appears to trust to the states, rather than the federal government, much of the enforcement of the Fourteenth Amendment.

#### G. *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*

The State of Florida managed to win yet another increase in state sovereign immunity against the very same plaintiff on the very same day. In *College Savings Bank v. Florida Prepaid Postsecondary Expense Board*<sup>99</sup> the Court overruled a thirty-five-year-old precedent and held that there can be no implied waiver of state sovereign immunity.<sup>100</sup>

In deciding *College Savings*, Justice Scalia suggested (but did not clearly state) that state sovereign immunity may be shredded in only two ways: either by valid Section 5 enforcement of the Fourteenth Amendment or by waiver.

While this immunity to suit is not absolute, we have recognized only two circumstances in which an individual may sue a State. First, Congress may authorize such a suit in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance. Second, a State may waive its sovereign immunity by consenting to suit.<sup>101</sup>

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<sup>97</sup> *Id.* at 643.

<sup>98</sup> *Id.* at 645 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 526 (1997)).

<sup>99</sup> 527 U.S. 666 (1999).

<sup>100</sup> *Id.* at 680 (“We think that the constructive-waiver experiment of *Parden* was ill-conceived, and see no merit in attempting to salvage any remnant of it . . . . Whatever may remain of our decision in *Parden* is expressly overruled.”) (overruling *Parden v. Terminal R. of Ala. Docks Dept.*, 377 U.S. 184 (1964)).

<sup>101</sup> *Id.* at 670 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883)).

Whereas *Florida Prepaid* limited the former, *College Savings* limited the latter circumstance in which an individual may sue a state. Justice Scalia held that, generally, the Court “will find a waiver either if the State voluntarily invokes [federal court] jurisdiction, or else if the State makes a ‘clear declaration’ that it intends to submit itself to [federal court] jurisdiction.”<sup>102</sup> Therefore, a state will not be held to have waived immunity even when it intentionally engages in an activity that is regulated by Congress, knowing that federal law controls that activity, and even knowing that Congress purports to subject the state to suit by individuals for violations of such federal law. After *College Savings*, states have absolutely no risk of subjecting themselves to federal jurisdiction over non-Section 5 suits by individuals, regardless of what activities they engage in. They will be subject to such suit if and only if they clearly and expressly declare that they waive their immunity.

#### H. *Alden v. Maine*

The final case in this state-sovereign-immunity trio decided on the last day of the 1998–1999 Term was *Alden v. Maine*.<sup>103</sup> Justice Kennedy wrote the majority opinion this time, and the five state-power Justices were unified—that is, there were no concurring opinions. *Alden*, the Court said, presented a question of first impression: “Whether Congress has authority under Article I to abrogate a State’s immunity from suit [for money damages] in its own courts.”<sup>104</sup> The Court, of course, answered in the negative,<sup>105</sup> but Justice Kennedy first generated a considerable amount of explanation before even reaching this statement of the issue’s novelty. This preliminary explanation, in part, consisted of a demonstration of the surprising premise that state sovereign immunity does not arise from the Eleventh Amendment. Rather, the immunity was held to arise from the structure of the original, pre-amendment Constitution. After all, as the dissent pointed out, “the state forum renders the Eleventh Amendment beside the point,”<sup>106</sup> and thus immunity in state court must be found elsewhere.

Several of Justice Kennedy’s federalism themes in *Alden* are familiar from his opinion in *Term Limits*. This is so, even though in the latter case he was joined by the exact opposite group of Justices. In particular, he reasserted the interpretation of “reserved” (in the Tenth Amendment) that he helped make

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<sup>102</sup> *Id.* at 675–76 (citing *Gunter v. Atl. Coast Line R. Co.*, 200 U.S. 273, 284 (1906); and quoting *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)).

<sup>103</sup> 527 U.S. 706 (1999).

<sup>104</sup> *Id.* at 741.

<sup>105</sup> *Id.* at 712.

<sup>106</sup> *Id.* at 760 (Souter, J., dissenting).

official in *Term Limits*, and reemphasized the importance of republicanism and an equilibrious balance between the state and national governments as independent sovereigns.<sup>107</sup>

State sovereign immunity, he said:

neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, . . . [it] is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.<sup>108</sup>

He described states as “residuary sovereigns”<sup>109</sup> that “retain”<sup>110</sup> certain aspects of sovereignty that are “preserved”<sup>111</sup> by the Constitution. Justice Kennedy thus unequivocally contradicted Justice Thomas’s view, expressed in Justice Thomas’s *Term Limits* dissent, that the Tenth Amendment affirmatively granted powers to the states.<sup>112</sup> On the other hand, Justice Kennedy was also clear in asserting that the federal government has no powers that “are not granted to it by the constitution” either “expressly” or “by necessary implication.”<sup>113</sup>

As in *Term Limits*, Justice Kennedy advocated in favor of independent state and national republican representative political systems. When Congress attempts to allow citizens to enforce their federal rights in state courts in suits for damages, it “asserts authority over [one of] a State’s most fundamental political processes, [and thus] strikes at the heart of the political accountability so essential to our liberty and republican form of government.”<sup>114</sup> This, wrote Justice Kennedy, “would blur . . . the distinct responsibilities of the State and National Governments.”<sup>115</sup> Thus, even though states are required by the Supremacy Clause to follow federal laws, state courts need not enforce these laws against their states in favor of citizens claiming damages, because allocation of states’ money among their citizens is purely within the state sphere of power.

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<sup>107</sup> See *supra* text accompanying notes 33–36 (discussing Justice Kennedy’s *Term Limits* majority interpretation of “reserved” in the Tenth Amendment).

<sup>108</sup> *Id.* at 713.

<sup>109</sup> *Id.* at 748.

<sup>110</sup> *Id.* at 713.

<sup>111</sup> *Id.* at 748.

<sup>112</sup> See *supra* Part II.B. It is curious that Justice Thomas declined to write separately to assert his theory.

<sup>113</sup> *Alden*, 527 U.S. at 739 (quoting *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 326 (1816)) (internal quotation marks removed).

<sup>114</sup> *Id.* at 751.

<sup>115</sup> *Id.*

## I. *Kimel v. Florida Board of Regents*

Early in the following term, in *Kimel v. Florida Board of Regents*,<sup>116</sup> the Court invalidated the Age Discrimination in Employment Act (ADEA)<sup>117</sup> insofar as it purported to allow individuals to enforce it against states in federal court. For a federalism case, *Kimel* created a superficially unusual division of the Justices. The bulk of Justice O'Connor's majority opinion<sup>118</sup> was joined by the other four conservative Justices, but its part III was joined instead by the Chief Justice and Justices Scalia, Souter, Ginsburg, and Breyer.<sup>119</sup> Part III concluded that Congress's attempt to abrogate state sovereign immunity in enacting the ADEA was expressed unequivocally.<sup>120</sup> The Court has held such unequivocal expression of intent to be a necessary prerequisite to abrogating Eleventh Amendment state sovereign immunity by way of Section 5 of the Fourteenth Amendment.<sup>121</sup> Although Justices Souter, Ginsberg, and Breyer joined part III of the *Kimel* majority opinion, they also joined Justice Stevens's dissent,<sup>122</sup> which argued that neither the Eleventh Amendment nor the doctrine of state sovereign immunity limits Congress's power to allow enforcement of valid federal statutory obligations—including, he believed, the ADEA—against states by private citizens.<sup>123</sup> Consequently, these three liberal Justices' concurrence with Justice O'Connor's part III was not especially material to their views of constitutional federalism, nor did it indicate a breakdown of the five-four federalism split on the Court.

More relevant to the theoretical disunity in the state-power wing, Justices Thomas, joined by Justice Kennedy, dissented from part III.<sup>124</sup> In effect, his dissent argued for a more unequivocally unequivocal congressional expression of intent to abrogate state sovereign immunity. He believed in a higher threshold for this "unmistakably clear expression" requirement,<sup>125</sup> one that even Justices O'Connor and Scalia and Chief Justice Rehnquist would not require. On the other hand, although Justices Thomas and Kennedy want it to be especially

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<sup>116</sup> 528 U.S. 62 (2000).

<sup>117</sup> Pub. L. No. 104-208, § 101(a), 110 Stat. 3009, 3009–23 (1996) (codified at 29 U.S.C. § 623 (Supp. III 1997)).

<sup>118</sup> *Kimel*, 528 U.S. at 66–73, 78–92.

<sup>119</sup> *Id.* at 73–78.

<sup>120</sup> *Id.* at 78.

<sup>121</sup> See *Astascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985).

<sup>122</sup> *Kimel*, 528 U.S. at 92–97 (Stevens, J., dissenting in part and concurring in part).

<sup>123</sup> *Id.* at 93 (Stevens, J., dissenting in part and concurring in part).

<sup>124</sup> *Id.* at 99–109 (Thomas, J., concurring in part and dissenting in part).

<sup>125</sup> *Id.* at 105 (Thomas, J., concurring in part and dissenting in part).

burdensome for Congress to accomplish an unequivocal expression of intent to abrogate sovereign immunity, they agreed with the other conservative Justices that, even had the ADEA satisfied this requirement, it would still be an illegitimate attempt to use Section 5.

Justice O'Connor reasserted *Seminole Tribe's* holding that, even though the Commerce Clause may give Congress sole authority to regulate interstate commerce, that clause does not allow Congress to enforce such regulation by allowing private suits against states in federal courts.<sup>126</sup> Thus, paradoxically, power to regulate does not necessarily carry with it power to provide for enforcement. As Justice Stevens pointed out in dissent, it is hard to see how such an unenforceable power to regulate is a power at all.<sup>127</sup>

Justice O'Connor expressed distinct frustration with Justice Stevens's dissent: "the present dissenters' refusal to accept the validity and natural import of decisions like *Hans*, rendered over a full century ago by this Court, makes it difficult to engage in additional meaningful debate on the place of state sovereign immunity in the Constitution."<sup>128</sup> The remainder of her opinion asserted the majority's position that the ADEA does not address Fourteenth Amendment rights and thus does not fall within the Section 5 power of enforcement.

#### J. United States v. Morrison

Later that term, in *United States v. Morrison*,<sup>129</sup> the Court struck down the federal Violence Against Women Act as an invalid congressional attempt to use its Commerce Power. As in the typical federalism case, the Court split five-four with disagreement among the five conservative Justices as to what justified their decision. On the other hand, although this case would seem to be a mere reiteration of *Lopez*, there was no separate opinion by Justice O'Connor emphasizing her agreement with the non-federalism-related policies behind the statute.<sup>130</sup> One might have expected such an opinion, based on her reputation as a conservative Justice who nevertheless is an advocate of women's issues. What was similar to *Lopez* was the separate opinion of Justice Thomas, concurring, but arguing as usual that the Court's "substantial effects" test for determining the scope of the commerce power in fact results in that power being virtually limitless:

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<sup>126</sup> *Id.* at 80.

<sup>127</sup> *Id.* at 97 (Stevens, J., dissenting in part and concurring in part).

<sup>128</sup> *Id.* at 79-80 (referring to *Hans v. Louisiana*, 134 U.S. 1 (1890)).

<sup>129</sup> 529 U.S. 598 (2000).

<sup>130</sup> See *infra* Part III.D (discussing Justice O'Connor's tendencies in federalism cases).

[T]he very notion of a “substantial effects” test under the Commerce Clause is inconsistent with the original understanding of Congress’ powers and with this Court’s early Commerce Clause cases. By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits.<sup>131</sup>

Justice Thomas, therefore, continues to want to undo most of the Court’s Commerce Clause jurisprudence of the last couple of centuries.

Chief Justice Rehnquist’s majority opinion, however, unequivocally distanced the rest of the state-power Justices from Justice Thomas’s extreme view: “As we discussed at length in *Lopez*, our interpretation of the Commerce Clause has changed as our nation has developed.”<sup>132</sup> Given that Justice Thomas’s only goal in writing separately was to express dismay at the Court’s historically broad interpretation of the Commerce Clause, the conservative majority’s explicit acceptance of a relatively broad interpretation of the Commerce Clause again illustrated the significant rift between Justice Thomas and the rest of his conservative colleagues.

#### K. Board of Trustees of the University of Alabama v. Garrett

In the following term the Court returned again to state sovereign immunity, this time with respect to Title I of the Americans with Disabilities Act of 1990 (ADA).<sup>133</sup> In *Board of Trustees of the University of Alabama v. Garrett*<sup>134</sup> the usual five-member majority held that the Eleventh Amendment prohibits individual state employees from suing unconsenting states under Title I for money damages.<sup>135</sup> Chief Justice Rehnquist wrote the principal opinion, and Justice Kennedy wrote a brief concurring opinion, joined by Justice O’Connor.

For the first time, Chief Justice Rehnquist characterized the state-power majority as having “*extended* the [Eleventh] Amendment’s applicability to suits by citizens against their own States.”<sup>136</sup> This is a refreshingly candid admission of the Court’s activist disagreement with the actual language of the Eleventh Amendment. The former story was that, although the Amendment’s language does not say what the majority says it means, they “underst[and] the Eleventh Amendment to stand not so much for what it says, but for the

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<sup>131</sup> *Morrison*, 529 U.S. at 627 (Thomas, J., concurring).

<sup>132</sup> *Id.* at 607.

<sup>133</sup> 42 U.S.C. §§ 1211–12117 (1994).

<sup>134</sup> 121 S. Ct 955 (2001).

<sup>135</sup> *Id.* at 960.

<sup>136</sup> *Id.* at 962 (emphasis added).

presupposition . . . which it confirms.”<sup>137</sup> Now the state-power majority has conceded that, on the contrary, it has judicially “extended” the Eleventh Amendment.

*Garrett*’s most significant enhancement of state power is its raising of the bar for Section 5’s required congressional showing of “a history and pattern of unconstitutional” conduct.<sup>138</sup> Although Congress made the ADA enforceable against states only after “compil[ing] a vast legislative record documenting massive society-wide discrimination against persons with disabilities,”<sup>139</sup> the majority found that this record “simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled.”<sup>140</sup> In fact, the majority set a nearly impossible Section 5 hurdle for Congress by describing as the paradigm the Voting Rights Act of 1965.<sup>141</sup> This is a nearly impossible hurdle because, with the benefit of thirty-five years of hindsight, nothing could be more obvious today than that there was a problem of state-endorsed racial discrimination in voting in 1965. One need not look at the congressional findings; the fact of racial discrimination in the 1960s is prominent in the national conscience. To hold Congress to such a high standard is virtually to strip Congress of its Section 5 power. In fact, Chief Justice Rehnquist suggests such an accomplishment by describing Congress’s power as one to determine “*desirable* public policy,” as if to say that Congress may declare only what it wishes the law to be.<sup>142</sup>

Justice Kennedy, joined by Justice O’Connor, wrote a concurring opinion expressing rather strong favor for the policy behind the ADA: “I do not doubt that the Americans with Disabilities Act of 1990 will be a milestone on the path to a more decent, tolerant, progressive society.”<sup>143</sup> Apparently, however, his reason for nevertheless holding it inapplicable to state employers was that states do not discriminate—people do. It is wrong, he argued, “to say that the States in their official capacities, the States as governmental entities, must be held in violation of the Constitution on the assumption that they embody the misconceived or malicious perceptions of

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<sup>137</sup> *Seminole Tribe v. Florida*, 517 U.S. 44, at 54 (1996) (internal quotation marks omitted).

<sup>138</sup> *Garrett*, 121 S. Ct. at 964.

<sup>139</sup> *Id.* at 969 (Breyer, J., dissenting).

<sup>140</sup> *Id.* at 965; see also Michael H. Gottesman, *Disability, Federalism, and a Court with an Eccentric Mission*, 62 OHIO ST. L.J. 31, 105–07 (2001).

<sup>141</sup> *Garrett*, 121 S. Ct. at 967.

<sup>142</sup> *Id.* at 967 (emphasis added).

<sup>143</sup> *Id.* at 968 (Kennedy, J., concurring).



some of their citizens.”<sup>144</sup> One wonders whether Justices Kennedy and O’Connor would apply this same argument to corporations. On the other hand, they do emphasize that Congress “can compel the States to act,”<sup>145</sup> using language that may seem strong to some of their state-power colleagues.

Although Justice Kennedy’s concurring opinion is brief, it is long on support for the ADA’s goals and suggestion that such goals are based on real problems. In this way, it distinguishes itself from the principal opinion and further demonstrates the continuing rifts between the members of the state-power quintet with respect to federalism.

### III. THE UNDERLYING PHILOSOPHIES OF FEDERALISM

This section will seek each Justice’s personal theory of federalism. It will do so for each Justice by looking primarily at opinions written by that Justice but also by noting which other opinions that Justice joined or did not join. As a result, it will quickly become apparent just how divergent the various state-power Justices’ theories of federalism are. Nevertheless, even where their theories are inconsistent with each other, they usually converge at least on the results increasing state power. As the investigation in this section ought to make clear, the state-power quintet that has been making so much federalism law recently is not thereby generating a coherent theory of federalism. For the most part, what they are generating is a heated argument taking place in concurring opinions, while the states get their result of increased power, one case at a time.

#### A. *Chief Justice Rehnquist*

Chief Justice Rehnquist’s style of legal reasoning makes it difficult to extract his general theory of federalism from the opinions he writes. His style involves reasoning that stays very close to the facts of the case at hand and draws its patterns of inference almost exclusively from the language of previous cases. Whereas some of the other Justices make broad statements about history, original intent, and constitutional structure (all of which illuminate that Justice’s more general theoretical stance), the Chief Justice tends to refrain from this. As a result, an extraction of his more general theoretical stance must remain more speculative than that of the others. On the other hand, it can be revealing to look at the concurring opinions of the other state-power Justices that the Chief Justice has declined to join.<sup>146</sup> Equally revealing is the one opinion, written by Justice

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 969 (Kennedy, J., concurring).

<sup>146</sup> See *Printz v. United States*, 521 U.S. 898, 935–36 (1997) (O’Connor, J., concurring); *id.* at 936–39 (Thomas, J., concurring); *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 288–297

Kennedy, that the Chief Justice signed alone.<sup>147</sup> These concurring opinions are revealing because they embody disagreements between the Chief Justice and other Justices, and they generally contain broader theoretical assertions about federalism. One can thus attempt to learn what the Chief Justice believes by learning what he does not believe.

Because the Chief Justice's opinion in *Lopez* was signed by the entire state-power wing of the Court, it is of limited value as evidence of his personal general theory of federalism. However, it is worth looking at for this purpose because Justices Kennedy, O'Connor, and Thomas all expressed reservations with respect to it in concurring opinions. In his opinion, the Chief Justice tended to make his broader claims by way of quotation. For example, he quoted James Madison from the *Federalist*: "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."<sup>148</sup> To some extent, this assertion expresses the point of departure for the entire state-power wing of the Court. That is, the national government, as an entity created by the Constitution, can have powers only by virtue of the text of the Constitution, and, as a corollary, state powers are limited only by the text of the Constitution. This conception of constitutional federalism is certainly the view of Chief Justice Rehnquist, Justice Scalia,<sup>149</sup> and Justice Thomas.<sup>150</sup> As discussed more thoroughly below, Justice O'Connor<sup>151</sup> and especially Justice Kennedy<sup>152</sup> are wary of this interpretation of the Constitution's allocation of power between states and the national government. In fact, although Justice Kennedy generally signs others' opinions advocating this theory, his own opinions suggest a notion of constitutional federalism that is at odds with this theory, one whereby the Constitution allocates power to the states and the national government on more of an equal basis.<sup>153</sup>

In *Lopez*, Chief Justice Rehnquist also quoted Chief Justice Hughes's majority opinion in *Jones & Laughlin Steel*. Rehnquist decided to limit the

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(1997) (O'Connor, J., concurring); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838-845 (1995) (Kennedy, J., concurring); *United States v. Lopez*, 514 U.S. 549, 568-83 (1995) (Kennedy, J., concurring); *id.* at 584-602 (Thomas, J., concurring).

<sup>147</sup> *Coeur d'Alene Tribe*, 521 U.S. at 270-80 (Justice Kennedy delivered the opinion of the Court, but the Chief Justice joined only with respect to parts II.B, II.C, and II.D of the opinion).

<sup>148</sup> *Lopez*, 514 U.S. at 552 (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>149</sup> See *infra* Part III.C.

<sup>150</sup> See *infra* Part III.E.

<sup>151</sup> See *infra* Part III.D.

<sup>152</sup> See *infra* Part III.B.

<sup>153</sup> See *id.*

national government's Commerce Clause power in *Lopez*, he said, because it had to have *some* limit. Else, "the scope of the interstate commerce power . . . 'would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'"<sup>154</sup> This reasoning may seem arbitrary, but the disagreement shown in the concurring opinions suggests that Chief Justice Rehnquist's drawing of the Commerce Clause line at this case may simply have been a compromise designed to garner a majority of signatures.

For example, in their concurring opinion, Justices Kennedy and O'Connor did not seem worried by Chief Justice Rehnquist's slippery slope argument that, if the Commerce Clause does not stop at the *Lopez* facts, it may not stop anywhere. Instead, they argued that the political process, rather than the Court, should generally determine the appropriate balance of powers between the state and national governments.<sup>155</sup> They argued that *Lopez* was merely a case where "one or the other level of Government has tipped the scales too far," thus justifying the Court's intervention to tip them back.<sup>156</sup>

In contrast to both Justice Kennedy's concurrence and Chief Justice Rehnquist's principal opinion, Justice Thomas believes that the Court was already at the bottom of the slippery slope. That is, he believes that the Court's usual articulation of the scope of the commerce power—the "substantial effects" test—"appears to grant Congress a police power over the Nation."<sup>157</sup> Justice Thomas thus is happy that the Court has stopped the national government's power under the Commerce Clause *somewhere*, but he believes that the Court should go much further in limiting this power. He does not want the Court to leave the federal balance to the political process; instead, he wants the Court to confine the national government's commerce power to the text of the Commerce Clause.<sup>158</sup>

The Commerce Clause and constitutional federalism interpretations of Justice Thomas, on the one hand, and Justices Kennedy and O'Connor, on the other, are thus apparently irreconcilable in theory. Justice Thomas believes that the Court should be strict in striking down all federal legislation that does not fit his narrow reading of the Commerce Clause. Justices Kennedy and O'Connor

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<sup>154</sup> *United States v. Lopez*, 514 U.S. 549, 557 (1995) (quoting *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 37 (1937)); see also Hovenkamp, *supra* note 25, at 2225–26.

<sup>155</sup> *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring) ("Our role in preserving the federal balance seems more tenuous.").

<sup>156</sup> *Id.* at 578 (Kennedy, J., concurring).

<sup>157</sup> *Id.* at 600 (Thomas, J. concurring).

<sup>158</sup> Of course, the Commerce Clause ("The Congress shall have Power . . . To regulate Commerce . . . among the several States . . .") is as ambiguous as any clause in the Constitution, and therefore it is not very helpful to say it should be limited to its text. U.S. CONST. art. I, § 8, cl. 3.

believe that the Court should be reluctant to interfere in what they view as more appropriately a political battle. They believe that the state and national governments should usually be allowed to come to a balance of power through the political process set up by the Constitution. The Court need interfere only when one side's "intrusion" upon the other's proper sphere of power is "significant."<sup>159</sup>

Yet, despite the irreconcilability of these theories, all of these Justices signed Justice Rehnquist's opinion in *Lopez*. This seems to be the key to understanding what is behind Justice Rehnquist's opinion: it is a compromise. It is not a compromise of each Justice's theories of constitutional federalism and the Commerce Clause. Rather, the five state-power Justices sacrificed offering any useful theory behind their holding so that they could come to a specific result with which they all agreed: that the Gun Free School Zones Act was outside of the national government's sphere of power. Chief Justice Rehnquist's majority opinion reached this result without offending the theories of any of the concurring Justices, but the only way it could do this was by being devoid of any useful theoretical backing itself. His *Lopez* opinion therefore reveals little if anything of his own theory of federalism. On the other hand it is an excellent illustration of the fact that the Court is making federalist law without a unified federalist idea.

Chief Justice Rehnquist's opinion in *Seminole Tribe*, also, is of limited usefulness for the present investigation. Like most of the Court's state sovereign immunity decisions, it totally unified the state-power wing of the Court.<sup>160</sup> Because of this unity, without even any concurring opinions expressing reservations, the opinion did not reveal the disunity in federalism theory that many of the other cases do. What it did show (especially in conjunction with *Alden*, *College Savings*, and *Florida Prepaid*) was that, although the state-power Justices have highly divergent theories of federalism in general, they all agree for the most part that the national government's power to abrogate states' sovereign immunity from citizen suits is severely limited.<sup>161</sup>

Justice Rehnquist wrote that the Eleventh Amendment "stands for," and "confirms," the "presupposition . . . that each State is a sovereign entity in our

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<sup>159</sup> *Lopez*, 514 U.S. at 583 (Kennedy, J., concurring).

<sup>160</sup> Compare *Seminole Tribe v. Florida*, 517 U.S. 44 (1996), with *Alden v. Maine*, 527 U.S. 706 (1999), *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627 (1999).

<sup>161</sup> Note that, in *Coeur d'Alene Tribe*, this unity breaks down with respect to *Ex parte Young* jurisdiction, as discussed *supra* Part II.D. *Coeur d'Alene Tribe* is unusual in that it reveals a division between Chief Justice Rehnquist's federalism and that of Justices O'Connor, Scalia, and Thomas.

federal system.”<sup>162</sup> This may be a bit of an overstatement, tempered by his subsequent assertion that states “maintain certain attributes of sovereignty, including sovereign immunity.”<sup>163</sup> Thus, although the state-power Justices like to emphasize the sovereign aspects of states, description of them as “sovereigns” or “sovereign entities” may be somewhat of a rhetorical overstatement. Everyone knows that states are not sovereigns in the same sense that the United States or China are sovereigns. They once were (according to official Supreme Court history), but they cashed in certain aspects of that sovereignty in exchange for unity under the Constitution with the other states.

As *Lopez* revealed, there is no majority view on the Court on how exactly the Constitution deals with reallocating sovereign powers between the state and national governments. However, the state-power majority does agree that “the Fourteenth Amendment, by expanding federal power at the expense of state autonomy, had fundamentally altered the balance of state and federal power struck by the Constitution,”<sup>164</sup> (whatever that balance was). That is, the Fourteenth Amendment gave the national government increased powers both over, and relative to, the states. And it even gave the national government the power to abrogate, in some limited circumstances, the states’ sovereign immunity from citizen suit. According to the Court, the national government cannot abrogate this immunity except “pursuant to a constitutional provision granting Congress the power” to do so.<sup>165</sup> This statement is very much in line with the principle that the national government has only the limited, specific, enumerated powers given it by the constitution. Thus, in *Seminole Tribe*, as in *Lopez*, Chief Justice Rehnquist emphasizes this view.

The Chief Justice’s own view is shown to diverge from those of some of the other state-power Justices in *Coeur d’Alene Tribe*. In particular, he is the only other Justice to join the non-majority sections of Justice Kennedy’s principal opinion. These minority sections of Kennedy’s opinion argue that the state courts should be on a more equal footing with the federal courts in interpreting federal law. “Interpretation of federal law is the proprietary concern of state, as well as

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<sup>162</sup> *Seminole Tribe*, 517 U.S. at 54 (internal quotation marks omitted). More accurately, the Court says that this is one “part” of the presupposition, the other part of which is that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” *Id.* (quoting *Hans v. Louisiana*, 134 U.S. 1, 13 (1890) (quoting *THE FEDERALIST* No. 81 (Alexander Hamilton) (C. Rossiter ed. 1961))).

<sup>163</sup> *Id.* (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)).

<sup>164</sup> *Id.* at 59 (citing *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455 (1976)).

<sup>165</sup> *Id.* at 59. As *Alden*, *College Savings*, and *Florida Prepaid* reveal, Section 5 of the Fourteenth Amendment is now the only provision granting Congress this power. See *supra* parts II.H, II.G, and II.F.

federal, courts.”<sup>166</sup> Thus, in this case, Justice Kennedy argues, with Chief Justice Rehnquist, that the Court should apply “a careful balancing and accommodation of state interests when determining whether the *Young* exception applies in a given case.”<sup>167</sup>

Their notion of constitutional federalism is that the state and national governments (including their courts) are to be equals. Although federal law is supreme under the Supremacy Clause, the state courts have no less of an obligation and ability than do the federal courts to uphold and interpret federal law. “A doctrine based on the inherent inadequacy of state forums would run counter to basic principles of federalism.”<sup>168</sup> Not surprisingly, because this is Justice Kennedy’s opinion, this view is consistent with Justice Kennedy’s views as expressed in the other cases.<sup>169</sup> What is interesting is that Chief Justice Rehnquist chose to join Justice Kennedy in the latter’s application of this federalist philosophy to this case.

As seen above, the Chief Justice’s general theory of federalism is extraordinarily difficult to glean from his own opinions. In *Lopez*, this was because his opinion was a vehicle for the state-power wing of the Court to come together and agree on a result where their underlying theoretical bases differed greatly. In *Seminole Tribe* and *Florida Prepaid*, his federalist theory is not distinguished from those of the other state-power Justices, because, in each of those cases, he was writing for the entire state-power quintet without any separate concurrences filed. *Coeur d’Alene Tribe*, then, seems to align Chief Justice Rehnquist with Justice Kennedy against the other three state-power Justices on federalist theory. However, this apparently cannot be the case, for the Chief Justice declined to join Justice Kennedy’s concurring opinion in *Lopez*. The crucial place to find hints of the Chief Justice’s federalist theory thus seems to be in the differences between Justice Kennedy’s concurring opinions in *Coeur d’Alene Tribe* and *Lopez*. Indeed, important differences there ought to be, for Justice O’Connor takes the reverse approach to the Chief Justice, joining Justice Kennedy’s opinion in *Lopez* where the Chief Justice does not, and not joining Justice Kennedy’s opinion in *Coeur d’Alene Tribe* where the Chief Justice does join.

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<sup>166</sup> *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 275 (1997).

<sup>167</sup> *Id.* at 278.

<sup>168</sup> *Id.* at 275.

<sup>169</sup> See *infra* Part III.B. Justice Kennedy’s federalist theory is centered around the idea of a serious equality between state and federal governments, with some broadly equilibrating balance in power being the constitutional mandate. He disfavors interference by federal courts into what he sees as the appropriately political—and not judicial—battle for power between state and national governments.

Unfortunately, in the end, contrasting these two opinions by Justice Kennedy will disappoint anyone seeking Chief Justice Rehnquist's general theory of federalism. The Chief Justice's principal opinion in *Lopez* is a philosophically neutral compromise between members of a philosophically splintered majority. Justice Kennedy's concurring opinion (joined by Justice O'Connor) expresses strong reservations with the principal opinion, barely agreeing with it at all. The Chief Justice, having authored the principal opinion with which Justice Kennedy's concurring opinion disagreed, was therefore in no position to join Justice Kennedy's concurring opinion, even if he did agree with its theoretical basis. In *Coeur d'Alene Tribe*, on the other hand, Justice Kennedy's opinion was the principal opinion, and the Chief Justice was thus in a position to join as much or as little of it as he pleased.

On the other hand, there are some substantive differences between these opinions of Justice Kennedy, differences that do reveal subtle divergence of his theory from Chief Justice Rehnquist's. *Lopez* was about the Commerce Clause power of Congress to regulate activity within states. Justice Kennedy disagreed with the principal opinion's emphasis on stemming the tide of congressional power relative to state power. That is, whereas Justice Kennedy's approach is to make the Court a neutral referee that keeps an eye out for either national or state governments gaining too much power through the political process, the Chief Justice's principal opinion seems to focus only on stopping, or even reducing, national power. Thus, when it comes to congressional power, at least, the Chief Justice is happy to play a part in dictating the proper constitutional limit on national power. Justice Kennedy would prefer the Court to stay out of the game until one *or* the other goes too far.

Contrast this with *Coeur d'Alene Tribe*. In this case, the issue was the federal courts' power over state governments with respect to citizens' suits against states. Here, Justice Kennedy still wanted the federal courts to stay out of what he saw as a properly political battle to find an equilibrious balance of state versus national power. Chief Justice Rehnquist thinks this is a fine theory here, where the Court would be going against a state rather than against Congress. He is quite willing to have the Court step in to oppose congressional power, but less willing to have the Court step in to enforce citizens' federal rights against states.

Therefore, in the contrast between these two concurring opinions of Justice Kennedy, a glimmer of the Chief Justice's theory of federalism appears. At the very least this contrast shows where the Chief Justice and Justice Kennedy diverge in their theories. There is evidence in *Coeur d'Alene Tribe* that the Chief Justice agrees to some extent with Justice Kennedy's vision of state and national governments as politically dueling equals, roughly balanced in an equilibrium of power due to their separate accountability to their citizens. However, the agreement goes only so far. The Chief Justice does not adhere to this theory when the Court is positioned against congressional power rather than against

state power. He is willing to have the Court actively control congressional power where Justice Kennedy cautions a more neutral and passive approach. He wants the Court to back off where states are defendants against citizens and the state courts could in theory handle the case.

Examining these cases thus leaves us with a picture of Chief Justice Rehnquist as a rather one-directional defender of state power against encroachment of national power.<sup>170</sup> He agrees with Justice Kennedy's theory of a passive Court in federalism issues, but only insofar as that theory supports the Court limiting or reducing its own power (as a part of the national government) over states and relative to state courts. Where that theory dictates that the Court refrain from opposing congressional power, the Chief Justice abandons it. Indeed, this picture of the Chief Justice's federalism comports as well with his support in *Lopez* and *Seminole Tribe* of the idea that "[t]he powers delegated by the . . . Constitution to the federal government are few and defined[, and] . . . [t]hose which . . . remain in the State governments are numerous and indefinite."<sup>171</sup>

### B. *Justice Kennedy*

In contrast to the Chief Justice, Justice Kennedy is always forthcoming with his theoretical bases for his federalism opinions. Where some of the other state-power Justices emphasize limits on national power,<sup>172</sup> Justice Kennedy tends rather to emphasize the benefits of "the tension between federal and state power."<sup>173</sup> Where these other Justices are comfortable with the Court dictating the boundaries between national and state power,<sup>174</sup> Justice Kennedy tends to advocate a passive Court except where extreme imbalances between state and national power arise: "Our role in preserving the federal balance seems more tenuous."<sup>175</sup>

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<sup>170</sup> Professor Sullivan characterizes him as favoring a "one way ratchet, invalidating a federal encroachment upon the states but not a state encroachment upon the federal government." Sullivan, *supra* note 45, at 103.

<sup>171</sup> *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>172</sup> Particularly, Chief Justice Rehnquist and Justices Scalia and Thomas. *See supra* part III.A, and *infra* parts III.C & III.E.

<sup>173</sup> *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring) (quoting Justice O'Connor's principal opinion in *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991)).

<sup>174</sup> For example, see Chief Justice Rehnquist and Justices Scalia and Thomas in *Lopez*; Justices O'Connor, Scalia, and Thomas in *Coeur d'Alene Tribe*; and Justice Thomas in *Printz*.

<sup>175</sup> *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring).



More generally, though, Justice Kennedy's federalist theory is grounded in the notion of the national and state governments being separate republican governments, each independently accountable to its citizens. He emphasizes the view that the Constitution "establish[ed] two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."<sup>176</sup> The tension arising from this dual representative capacity of the government is the appropriate source of allocation of power between the state and national governments, according to Justice Kennedy. That is, the political process, and not the courts, should usually determine the boundaries of the spheres of federal and state power.

In fact, Justice Kennedy's ideal of a federal court that is relatively passive on federalist matters diverges from all of the other Justices' federalist ideals, though not all in the same case. In *Lopez*, only Justice O'Connor agrees with his desire to generally keep the Court out of the business of delineating the limits of Congress's Commerce Clause power.<sup>177</sup> On the other hand, in *Coeur d'Alene Tribe*, only Chief Justice Rehnquist agrees with Justice Kennedy's desire to leave more *Ex parte Young* cases up to state—rather than federal—courts to determine.<sup>178</sup>

Another distinguishing characteristic of Justice Kennedy's theory is his interpretation of the Tenth Amendment. Here, his theory diverged so sharply from those of the other state-power Justices that it aligned him with the usual dissenters in *Term Limits*. Ironically, this resulted in his interpretation of the Tenth Amendment becoming law. That is, *Term Limits* made official his theory that the Tenth Amendment "reserved" to the states only those powers that were in the states prior to unification, less the powers that the Constitution gives to the national government. By this theory, the Tenth Amendment does not give the states any powers that exist only because of unification under the Constitution.<sup>179</sup> Justice Kennedy reinforced this interpretation's status as law in his opinion in *Alden*. In that opinion, he referred to the states as "residuary sovereigns," arguing that the states have sovereign immunity because the Constitution "preserved" this aspect of sovereignty in the states.<sup>180</sup> This stance puts Justice Kennedy in stark

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<sup>176</sup> U.S. *Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>177</sup> See *Lopez*, 514 U.S. at 568–83 (Kennedy, J., concurring).

<sup>178</sup> *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 270–80 (1997).

<sup>179</sup> Therefore, as explained above, *Term Limits* held that the states have no power under the Tenth Amendment to place qualifications on congressional candidates, because the power to impose such qualifications exists only as a result of unification under the Constitution. See *supra* Part II.B.

<sup>180</sup> *Alden v. Maine*, 527 U.S. 706, 748 (1999).

opposition to Justice Thomas's view as expressed in his *Term Limits* dissent.<sup>181</sup> There, Justice Thomas argued that the Tenth Amendment powers of the states are not limited to the residual powers that were in them prior to unification, but that the Amendment affirmatively gives the states any powers that the Constitution does not explicitly (or by "necessary implication") give to the national government. This is a major and fundamental disagreement among the state-power Justices on constitutional federalism. And yet these Justices repeatedly come together to make federalist law.

Finally, Justice Kennedy distinguishes himself from most of the other Justices in his focus on the "dignity and respect"<sup>182</sup> that he sees inhering in states' sovereignty. In particular, "it is in this rather abstract notion of sovereign 'dignity' that he finds the states' sovereign immunity."<sup>183</sup> However, he is clear that this sovereign "dignity" goes only so far in determining federalism issues. The states, he concedes, "retain the dignity, though not the full authority, of sovereignty;" and Congress "can compel the States to act."<sup>184</sup> In making these statements, Justice Kennedy shows a greater willingness than the other state-power Justices toward admitting limits on state power.

Most fundamentally, therefore, Justice Kennedy's theory of federalism differs from those of the other state-power Justices in (1) the central role it gives to the Constitution's dual-republican system of government, (2) the severely limited role it gives the federal courts in determining the allocation of power between the state and national governments, and (3) its emphasis on not only limits on national power, but limits on state power as well.<sup>185</sup> These are not superficial differences in federalist theory; they are fundamental. These

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<sup>181</sup> In fact, Kennedy may be in disagreement with all of the other state-power Justices on this matter due to the fact that they joined Justice Thomas's *Term Limits* dissent and failed to write dissents of their own. See *Term Limits*, 514 U.S. at 845-926 (Thomas, J., dissenting); see also *supra* part II.B.

<sup>182</sup> *Coeur d'Alene Tribe*, 521 U.S. at 268.

<sup>183</sup> "The principle of sovereign immunity preserved by constitutional design 'thus accords the States the respect owed them as members of the federation.'" *Alden*, 527 U.S. at 748-49 (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). "Congress must accord States the esteem due to them as joint participants in a federal system, one beginning with the premise of sovereignty in both the central Government and the separate States." *Id.* at 758.

<sup>184</sup> *Id.* at 715; *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955, at 969 (Kennedy, J., Concurring).

<sup>185</sup> "Justice Kennedy alone sees the Court's role in federalism disputes as a two-way ratchet, stopping the states from 'invad[ing] the sphere of federal sovereignty' but also holding the federal government 'within the boundaries of its own power when it intrudes upon matters reserved to the States.'" Sullivan, *supra* note 16, at 103 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring)).

fundamental differences in the theoretical bases behind the state-power Justices' state-power votes on federalism decisions make the impact of the decisions puzzling. For if one looks hard enough in seeking the federalism theory behind these decisions for guidance, one will not find a theory agreed upon by all the voting Justices. This fact is shown by examining the theories of the Chief Justice and Justice Kennedy alone. It is shown even further by attempting to extract the theories on which Justices Scalia,<sup>186</sup> O'Connor,<sup>187</sup> and Thomas<sup>188</sup> base their votes.

### C. Justice Scalia

Justice Scalia's federalism theory is as difficult to extract as Chief Justice Rehnquist's. Justice Scalia wrote two of the principal opinions for the cases examined in this note, but he wrote no concurring opinions expressing his disagreement with the other Justices' principal opinions. He did, however, indicate a disagreement with Justice Kennedy and Chief Justice Rehnquist by not joining the former's minority opinion sections in *Coeur d'Alene Tribe*, and by signing Justice O'Connor's concurring opinion. However, this was the only time Justice Scalia signed a non-principal opinion by a state-power Justice.

Justice Scalia is well known for his textualism and originalism.<sup>189</sup> In fact, in *Printz*, he made clear that the reason he went beyond the text in deciding the case was that "there is no constitutional text speaking to this precise question."<sup>190</sup> However, notwithstanding his impassioned advocacy of objective, formalistic judicial decision-making, Justice Scalia is not universally viewed as practicing what he preaches. As a cynical speculation, this may explain the lack of a discoverable theoretical basis behind his federalism votes. That is, perhaps he is interested only in the results that favor state power. Indeed, this could explain as well the difficulty in extracting any theory behind Chief Justice Rehnquist's federalism votes.

On the other hand, there is an equally plausible and more generous explanation. Namely, Justice Scalia and Chief Justice Rehnquist may just fall between the other disagreeing state-power Justices on most issues of federalism. Hence, they tend not to join the concurring opinions of the other three state-

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<sup>186</sup> See *infra* Part III.C.

<sup>187</sup> See *infra* Part III.D.

<sup>188</sup> See *infra* Part III.E.

<sup>189</sup> See M. David Gelfand & Kieth Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443, 1443 (1990) (arguing that Justice Scalia's approach to federalism is partly explained by his "decided preference for a more formalistic, rule-bound methodology").

<sup>190</sup> *Printz v. United States*, 521 U.S. 898, 905 (1997).

power Justices, resting relatively content with the compromise reached in the principal opinions. Regardless of which explanation of Justice Scalia's federalism voting is accurate, there are nevertheless some indications of his personal theory of federalism.

First, and perhaps most obvious, is Justice Scalia's sole disagreement with Chief Justice Rehnquist, namely in *Coeur d'Alene*. Recall that although Justice Kennedy wrote the official principal opinion in that case, parts of it were joined only by the Chief Justice. Justice Scalia instead joined Justice O'Connor's concurring opinion, which expressed disagreement with the principal opinion. This disagreement is summarized as follows:

When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar. Yet the principal opinion unnecessarily questions this basic principle of federal law . . . There is no need to call into question the importance of having federal courts interpret federal rights—particularly as a means of serving a federal interest in uniformity—to decide this case.<sup>191</sup>

Thus, although the Chief Justice came down in each case in favor of the result of increased state power, this was not true of Justice Scalia. He, along with Justices O'Connor and Thomas, was unwilling to narrow the *Ex parte Young* doctrine so as to be limited by a case-by-case consideration of state interests and the importance of the federal right at stake. They view the availability of *Ex parte Young* jurisdiction as an important limit on how far they will go toward increasing or shielding state power. The strength of the disagreement is emphasized by the fact that, normally, when it comes to Eleventh Amendment state sovereign immunity from suit, the five state-power Justices are in unison in favor of immunity.<sup>192</sup> Justice Scalia and the other two stop, though, when it comes to an individual's ability to get purely prospective relief in federal court from a state official's violation of federal rights. Only Justice Kennedy and the Chief Justice are willing to limit this ability, and this is the only difference in voting between Justice Scalia and the Chief Justice.

Additionally, in his *College Savings* principal opinion, Justice Scalia makes some claims against legislative flexibility that are opposed to opinions expressed by some of the other state-power Justices:

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<sup>191</sup> *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 293 (1997) (O'Connor, J., concurring) (internal citation omitted).

<sup>192</sup> See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (2001), *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000), *Alden v. Maine*, 527 U.S. 706, 710 (1999), *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 667 (1999), *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627, 629 (1999).

[T]o say that the degree of dispersal [of governmental power] to the States, and hence the degree of check by the States, is to be governed by Congress's need for "legislative flexibility" is to deny federalism utterly. . . . Legislative flexibility on the part of Congress will be the touchstone of federalism when the capacity to support combustion becomes the acid test of a fire extinguisher. Congressional flexibility is desirable, of course—but only within the *bounds of federal power* established by the Constitution. Beyond those bounds (the theory of our Constitution goes), it is a menace.<sup>193</sup>

In contrast to this, Justices Kennedy and O'Connor, in the former's concurring *Lopez* opinion, expressed their support for the need for such flexibility:

In referring to the whole subject of the federal and state balance, we said this just three Terms ago:

This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. . . . [T]he powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role.<sup>194</sup>

Therefore, Justice Scalia's theory that legislative flexibility is generally opposed to constitutional federalism is at odds with Justice Kennedy and Justice O'Connor's theory. Although Justice Scalia claimed that the Constitution's federalism opposes legislative flexibility, in truth it is Justice Scalia's textualism that opposes legislative flexibility.<sup>195</sup> Nothing in the Constitution sets out an exhaustively specific description of a rigid federalist structure. Rather, the Constitution's federalism—like most other aspects of the Constitution—is vague, general, and not fixed to any particular historical period of the nation's development.<sup>196</sup> The point to be seen in this criticism for present purposes is that this theoretical disagreement about federalism and legislative flexibility between Justice Scalia and Justices Kennedy and O'Connor is, in all likelihood, actually a disagreement about textualism and legislative flexibility; it just happens to be in the context of federalism here.

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<sup>193</sup> *College Savings Bank*, 527 U.S. at 690.

<sup>194</sup> *United States v. Lopez*, 514 U.S. 549, 574–75 (1995) (Kennedy, J., concurring) (quoting *New York v. United States*, 505 U.S. 144, 157 (1992)).

<sup>195</sup> See Gelfand & Werhan, *supra* note 189, at 1459–60.

<sup>196</sup> As Professor Merritt aptly put it, "Much of our Constitution is written with abstract, timeless words. The phrase 'Commerce among the several States' is not the same as 'Commerce among the several states that was technologically feasible in 1787.'" Merritt, *supra* note 5, at 1207.

Therefore, Justice Scalia's theory of federalism is at least as obscure as Justice Rehnquist's.<sup>197</sup> There is very little discernible theoretical basis behind his opinions and his votes in federalism cases. In fact, more than one commentator has pointed out that *Printz* (his only opinion in these cases with which any state-power Justice expressed reservations) was based on nothing more than citation to *New York v. United States*.<sup>198</sup> Perhaps the only significant conclusion that can be drawn about Justice Scalia's federalism theory is the cynical one that, like Chief Justice Rehnquist, he has no theoretical basis for his federalism decisions beyond the desire to see results in favor of state power. But this is a speculative proposition given the unrevealing nature of his opinions. Unlike the Chief Justice, however, Justice Scalia has indicated limits to this desire: he believes that a state, under the name of a state officer, ought to be susceptible to suit in federal court by an individual for purely prospective relief from the officer's violation of the individual's federal rights.

#### D. Justice O'Connor

Commentators have speculated that Justice O'Connor's strong background in state politics has made her a staunch defender of state autonomy on the Supreme Court.<sup>199</sup> True as this may be, the cases considered in this note reveal her to be a relative moderate among the state-power Justices on this issue. She has never signed Justice Thomas's extreme concurring opinions in favor of state power.<sup>200</sup> She wrote the *Coeur d'Alene Tribe* concurring opinion<sup>201</sup> that protected *Ex parte Young* jurisdiction against the attack waged by Justice Kennedy and Chief Justice Rehnquist.<sup>202</sup> Finally, she respectively wrote and

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<sup>197</sup> See Gelfand & Werhan, *supra* note 189, at 1449 ("Justice Scalia's judicial opinions on key federalism issues generally have been brief, almost cryptic.").

<sup>198</sup> See, e.g., Jackson, *supra* note 5, at 2192 ("Although he is usually a constitutional originalist, Justice Scalia's discussion of text, history, and structure is largely defensive and at best inconclusive. Justice Scalia treated the Court's own decisions, of more recent vintage, as most dispositive. The majority relied essentially on the evidence of *New York [v. United States]*.").

<sup>199</sup> See Richard A. Cordray & James T. Vradelis, Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 389, 423-36 (1985); Gelfand & Werhan, *supra* note 189, at 1449-56.

<sup>200</sup> See *Printz v. United States*, 521 U.S. 898, 936-39 (1997) (Thomas, J., concurring); *United States v. Lopez*, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring).

<sup>201</sup> *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 288-297 (O'Connor, J., concurring).

<sup>202</sup> See *id.* at 270-80.

signed concurring opinions in *Printz*<sup>203</sup> and *Lopez*<sup>204</sup> that urged moderation against eroding national power.

In *Coeur d'Alene Tribe*, Justice O'Connor's opinion was that *Ex parte Young* jurisdiction was unavailable to the plaintiff because the action, though formally pleaded as an *Ex parte Young* action, was in fact the functional equivalent of a non *Ex parte Young* action. That is, in substance the action was directly against the state; only through crafty pleading was it formally against a state officer. Justice Kennedy wanted to go further than this and limit the availability of *Ex parte Young* jurisdiction by a case-by-case consideration of "whether a state forum is available to hear the dispute, what particular federal right the suit implicates, and whether 'special factors counse[l] hesitation' in the exercise of jurisdiction."<sup>205</sup> Justice O'Connor was unwilling to further limit the *Young* doctrine in this way.<sup>206</sup> As much as she may be a defender of state autonomy, she would not go as far as Justice Kennedy and the Chief Justice in limiting an individual's ability to get *Ex parte Young* protection of federal rights in federal court against state officials.<sup>207</sup>

In a very brief concurring opinion, Justice O'Connor urged relative moderation in *Printz* as well.<sup>208</sup> It appears that although she agreed with the holding that Congress cannot directly commandeer state and local officers to carry out federal laws, Justice O'Connor nevertheless favored the policy behind the Brady Act. She was quick to clarify that the "holding, of course, does not spell the end of the objectives of the Brady Act."<sup>209</sup> She even suggested that Congress would be able constitutionally to make the commandeering provisions indirect through conditional federal spending rather than direct.<sup>210</sup> Justice

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<sup>203</sup> *Printz*, 521 U.S. at 935–36 (O'Connor, J., concurring).

<sup>204</sup> *Lopez*, 514 U.S. at 568–83 (Kennedy, J., concurring).

<sup>205</sup> *Coeur d'Alene Tribe*, 521 U.S. at 291 (O'Connor, J., concurring) (alteration in original) (quoting Part III.D of Justice Kennedy's opinion, joined by only Chief Justice Rehnquist (quoting *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396 (1971))).

<sup>206</sup> As Justice O'Connor wrote, "I would not narrow our *Young* doctrine, but I would not extend it to reach this case." *Id.* at 296–97 (O'Connor, J., concurring).

<sup>207</sup> "There is no need to call into question the importance of having federal courts interpret federal rights—particularly as a means of serving a federal interest in uniformity—to decide this case." *Id.* at 293 (O'Connor, J., concurring). It is especially interesting that Justices Scalia and Thomas join her in this relatively moderate view in favor of national power.

<sup>208</sup> *Printz v. United States*, 521 U.S. 898, 935–36 (1997) (O'Connor, J., concurring).

<sup>209</sup> *Id.* at 936 (O'Connor, J., concurring).

<sup>210</sup> "Congress is also free to amend the interim program to provide for its continuance on a contractual basis with the States if it wishes, as it does with a number of other federal programs." *Id.*

Scalia's principal opinion obliquely indicated disagreement with this suggestion.<sup>211</sup>

Finally, Justice O'Connor was the sole Justice to join Justice Kennedy's relatively moderate concurring opinion in *Lopez*.<sup>212</sup> As discussed above, they barely agreed with the principal opinion's limitation of the commerce power.<sup>213</sup> They expressed discomfort with the Court's apparent eagerness to take on the task of defining the boundaries between state and national power. In their opinion, these boundaries ought rather to be defined by way of the political process. The federal courts need to step in only in case "one or the other level of Government has tipped the scales too far."<sup>214</sup> Justices Kennedy and O'Connor further believe there is a need for divergence from the original intent or understanding of the broad language of the Commerce Clause, based on the drastically changed economic structure of the nation and states since the clause's drafting.<sup>215</sup> This belief puts them in disagreement with at least Justices Scalia<sup>216</sup> and Thomas,<sup>217</sup> who tend to be strict originalists.

Therefore, contrary to expectations that Justice O'Connor's background in state politics would lead her to be a staunch defender of state autonomy, she has turned out to be relatively moderate in this regard. At least relative to the company she keeps (on the state-power wing of the Court), she appears to be moderate. Where this is the case, the state-power wing can go only as far as Justice O'Connor will go in favor of state autonomy. Her concurring opinions in *Printz* and *Coeur d'Alene Tribe*, as well as her joining Justice Kennedy's concurring opinion in *Lopez*, indicate that the holdings of the state-power wing often reach the outer limits of her willingness to fight for state autonomy.

#### E. Justice Thomas

Arguably on the other end of the spectrum of the Court's state-power wing is Justice Thomas. Where Justices Kennedy and O'Connor urged relative moderation in *Lopez*,<sup>218</sup> Justice Thomas urged a severe reduction in Congress's

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<sup>211</sup> *Printz*, 521 U.S. at 917–18 (hinting that he would like to see the "validity" of "conditions upon the grant of federal funding" "challenged in a proper case").

<sup>212</sup> See *United States v. Lopez*, 514 U.S. 549, 568–83 (1995) (Kennedy, J., concurring).

<sup>213</sup> See *supra* notes 21–27 and accompanying text.

<sup>214</sup> *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring).

<sup>215</sup> See *id.* at 574–75 (Kennedy, J., concurring).

<sup>216</sup> See *supra* part III.C.

<sup>217</sup> See *infra* part III.E.

<sup>218</sup> See *Lopez*, 514 U.S. at 568–83 (Kennedy, J., concurring).



commerce power.<sup>219</sup> In *Printz*, where Justice O'Connor wrote a concurring opinion emphasizing the limits of the Court's holding, Justice Thomas not only reiterated his desire to eviscerate Congress's commerce power, but went so far as to suggest that the entire Brady Act was unconstitutional.<sup>220</sup>

Further evidence of Justice Thomas's state-power extremism is that his dissent in *Term Limits*<sup>221</sup> is the only federalism opinion of his that any other state-power Justice has signed. Every time the state-power wing has been in the majority in a federalism case—that is, every time a concurring opinion by Justice Thomas could affect the interpretation of the principal opinion—the other state-power Justices have avoided supporting his opinions with their signatures.<sup>222</sup>

On the other hand, in *Coeur d'Alene Tribe*, Justice Thomas joined Justice O'Connor's relatively moderate concurring opinion<sup>223</sup> in opposition to Justice Kennedy and the Chief Justice's attack<sup>224</sup> on *Ex parte Young* jurisdiction. Whereas Justice Kennedy and the Chief Justice wanted to erode individuals' access to federal court protection against state officers' violations of their federal rights, Justice Thomas would not go this far in favor of state power. As much as he is in favor of using the Court to increase state power relative to federal power, he is wary of leaving to the state courts enforcement of individual federal rights against violation by state officers.

In his *Lopez* concurring opinion, Justice Thomas revealed his activist desires<sup>225</sup> by urging that the Court "ought to temper [its] Commerce Clause jurisprudence."<sup>226</sup> Namely, he thought that the Court's "substantial effects" test<sup>227</sup> was invalid because it did not comport with his textualist-originalist

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<sup>219</sup> See *id.* at 584 (Thomas, J., concurring).

<sup>220</sup> *Printz v. United States*, 521 U.S. 898, 937 (1997) (Thomas, J., concurring) ("I question whether Congress can regulate the particular transactions at issue here."). The constitutionality of the entire Act was, of course, not before the Court.

<sup>221</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 845–926 (1995) (Thomas, J., dissenting).

<sup>222</sup> See *Printz*, 521 U.S. at 936–39 (Thomas, J., concurring); *United States v. Lopez*, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring).

<sup>223</sup> See *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 288–97 (O'Connor, J., concurring).

<sup>224</sup> See *id.* at 270–80.

<sup>225</sup> See Sullivan, *supra* note 16, at 106–07 ("Presumably, Justice Thomas would overrule *United States v. Darby* [312 U.S. 100 (1941)] and other decisions interpreting the Commerce Clause to allow the federal government effectively to exercise a police power over the states.").

<sup>226</sup> *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

<sup>227</sup> Under this test, Congress may regulate any activity that substantially affects interstate commerce.

reading of the Commerce Clause.<sup>228</sup> In his opinion, regardless of the possibility that “interstate commerce” today is no longer remotely similar to “interstate commerce” two hundred years ago, we should be bound to the Commerce Clause as understood two hundred years ago. Interestingly enough, not even Justice Scalia, notorious advocate of textualism-originalism, agreed with Justice Thomas’s approach to the Commerce Clause.

In his *Printz* concurring opinion, Justice Thomas reiterated his desire to fundamentally change the commerce power:

Although this Court has long interpreted the Constitution as ceding Congress extensive authority to regulate commerce (interstate or otherwise), I continue to believe that we must ‘temper our Commerce Clause jurisprudence’ and return to an interpretation better rooted in the Clause’s original understanding.<sup>229</sup>

Here, as in *Lopez*, no other state-power Justice—not even Justice Scalia—lent a signature in support of Justice Thomas’s strong textualist-originalist reading of the Commerce Clause. It is therefore clear that this is a marked divergence of federalist theories among the state-power Justices.

In his *Term Limits* dissent, Justice Thomas revealed his fundamental disagreement with Justice Kennedy’s understanding of constitutional federalism.<sup>230</sup> Most generally, the disagreement can be summarized as follows:

To the majority [including Justice Kennedy], the set of state powers over the composition and operation of the federal government was null except as constitutionally conferred. To the dissent [written by Justice Thomas], the set of state

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<sup>228</sup> “Even though the boundary between commerce and other matters may ignore ‘economic reality’ and this seem arbitrary or artificial to some, we must nevertheless respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce.” *Id.* at 593 (Thomas, J., concurring).

<sup>229</sup> *Printz v. United States*, 521 U.S. 898, 937 (1997) (Thomas, J., concurring) (quoting *Lopez*, 514 U.S. at 601 (Thomas, J., concurring)).

<sup>230</sup> Although the Chief Justice and Justices O’Connor and Scalia joined Justice Thomas’s dissent, this may indicate only the fact of their dissent rather than an agreement with the theories put forth by Justice Thomas. After all, whenever Justice Thomas writes an opinion on the majority side of a federalism case, these Justices are careful to withhold their signatures from such opinions. Adding their signatures to Justice Thomas’s *Term Limits* dissent posed no risk of increasing his federalism theory’s effect on the Court’s jurisprudence. It posed no such risk precisely because it was a dissenting opinion. This note, therefore, avoids inferring, from their signatures on this dissent, agreement with Justice Thomas’s theories underlying his dissent.

powers, even over the federal government, was infinite except as constitutionally surrendered.<sup>231</sup>

More specifically, the disagreement between Justice Thomas and Justice Kennedy that led to the latter joining the usual federalism-dissenters is based on Justice Kennedy's dual republicanism. Whereas Justice Kennedy argues that American citizens have two independent "political capacities, one state and one federal, each protected from incursion by the other,"<sup>232</sup> Justice Thomas argues that "the people of the several States are the only true source of power."<sup>233</sup> Therefore, Justice Thomas believes that state citizenship is primary: citizens of states have political power only *as* citizens of states.<sup>234</sup>

Justice Thomas therefore emerges most pronouncedly as having an extreme state-power Commerce Clause theory relative to the other state-power Justices. He would severely reduce Congress's power to regulate activity under the commerce power, whereas his fellow state-power Justices seem to worry only about vaguely keeping the commerce power from being universal.<sup>235</sup> As part of this divergence of federalism theories, it is interesting to see that Justice Thomas goes much further than Justice Scalia in terms of a textualist-originalist approach to the Commerce Clause. Also, Justice Thomas seems to be the strongest advocate of the theory of "primordial sovereignty of the states,"<sup>236</sup> a theory generally held at least by Chief Justice Rehnquist and Justice Scalia and perhaps by Justice O'Connor, but certainly not by Justice Kennedy. Finally, with Justices Scalia and O'Connor, Justice Thomas also emerges as a protector of *Ex parte Young* federal jurisdiction in suits against state officers.

Justice Thomas's federalism theory is thus another excellent example of the great and complex divergence of federalism theories among the state-power Justices who are creating federalist law. The next section examines this complex divergent set of theories as a whole and explicitly argues for a conclusion that should already be apparent: the state-power majority itself has no coherent theory behind the body of federalist law it has been creating. However, it also argues that this result should not be surprising.

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<sup>231</sup> Sullivan, *supra* note 16, at 91.

<sup>232</sup> U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

<sup>233</sup> *Id.* at 847 (Thomas, J., dissenting).

<sup>234</sup> *Supra* note 39.

<sup>235</sup> See United States v. Lopez, 514 U.S. 549, 564 (1995) ("Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by any individual that Congress is without power to regulate.").

<sup>236</sup> Sullivan, *supra* note 16, at 109.

## IV. CONCLUSION: RESULTS EMERGING FROM THEORIES CONVERGING

Although the same five Justices have joined almost universally to make the recent important decisions in favor of increased state sovereignty, there is no single official theory of federalism universally endorsed by a majority of the Court. This, of course, is a necessary result of the structure of the Supreme Court, but one that is often overlooked by commentators who purport to find crucial theoretical inconsistencies from one decision to the next.<sup>237</sup> Of course, the common law system should not permit surface inconsistencies between cases. However, this does not mean that the emergent theories—i.e., theories emerging from converging theories of individual Justices—underlying the cases need be consistent. Because of this common law structure whereby law is made by majority vote on perhaps no more than a case-specific result, the Supreme Court's federalism jurisprudence is confusingly complex.

Chief Justice Rehnquist has no theoretical basis discoverable in the current Court's federalism decisions.<sup>238</sup> At most, these decisions show him universally to advocate a results-based one-way ratchet in favor of increased state power.

We know that Justice Scalia has at least his formalist theory of textualism-originalism. However, this doctrine does not always get him very far on the federalism question.<sup>239</sup> His votes have been identical to those of the Chief Justice but with one fascinating difference: he would preserve federal courts' *Ex parte Young* jurisdiction to hear individuals' cases against states in the name of state officers.<sup>240</sup> "*Young* is commonly seen as a kind of civil rights facilitator,"<sup>241</sup> and this may explain the odd alignment of the state-power Justices in *Coeur d'Alene Tribe*.<sup>242</sup>

Justice Thomas applies hard-core textualism-originalism where even Justice Scalia would not, and thus comes up with a radically reduced reading of Congress's Commerce Clause power—a reading supported by no other

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<sup>237</sup> See Jackson, *supra* note 5, at 2228 ("In a polity that, at different times and for different reasons, values federalism to different degrees, caution is needed in urging any unified theory of federalism on the Court."). The footnote to this remark includes a brief list of commentators who have urged a unified theory upon finding inconsistencies from one decision to the next. *Id.* at 2228 n.215. Note, though, that Professor Jackson nevertheless wrote that "the Court's task is to articulate a flexible doctrine that helps maintain the pragmatic dynamism of federalism." *Id.* However, as this note shows, the Court's majority has failed to articulate any doctrine of federalism at all; rather it agrees only on case results while arguing over doctrine.

<sup>238</sup> See *supra* Part III.A.

<sup>239</sup> See *supra* Part III.C.

<sup>240</sup> See *supra* Part II.D.

<sup>241</sup> Hovenkamp, *supra* note 25, at 2246.

<sup>242</sup> See *supra* Part II.D.

Justice.<sup>243</sup> However, as extreme as Justice Thomas's commerce power aspirations may be, he, too, would preserve the federal courts' *Ex parte Young* jurisdiction over state officers.

Although Justice O'Connor was viewed early on as a indefatigable defender of state power,<sup>244</sup> she led the way in protecting *Ex parte Young* jurisdiction against the assault by Justice Kennedy and Chief Justice Rehnquist.<sup>245</sup> And, furthermore, more than any other state-power Justice, she has signed or written concurring opinions expressing disagreement with the doctrines behind the principal opinions, urging moderation, and limiting the Court's holding in these cases increasing state power.<sup>246</sup>

Justice Kennedy turns out to have probably the most developed theoretical basis for his federalism decisions, which leads him to be the least results-based Justice on the state-power wing.<sup>247</sup> This, of course, also leads him to be a surprisingly independent voice on the state-power wing, not remotely aligned with any other. His adherence to his "two-way ratchet" dual republicanism led him to launch the unsuccessful assault on *Ex parte Young* jurisdiction<sup>248</sup> and also led to the only break down of the state-power wing, in *Term Limits*.<sup>249</sup>

Rather than finding a coherent theoretical basis undergirding the Court's several recent increases in state power, we find instead a bare majority that can agree on little more than the case-specific results in favor of increased state power. With the exception of most of the non-*Young* Eleventh Amendment cases,<sup>250</sup> the Justices in the state-power majority regularly write concurring opinions in which they register their disagreement with the theoretical bases behind the principal opinions they signed. This hardly feels like solid law. When the majority agrees on little more than the case-specific results, there is no majority theory from which to usefully extrapolate. Although it may be a necessary result of our common law system of judicial decision-making, it is

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<sup>243</sup> See *supra* Part III.E.

<sup>244</sup> See *supra* Part III.D.

<sup>245</sup> See *supra* Part II.D.

<sup>246</sup> See *supra* Part III.D.

<sup>247</sup> See *supra* Part III.B.

<sup>248</sup> See *supra* Part II.D.

<sup>249</sup> See *supra* Part II.B.

<sup>250</sup> See *Alden v. Maine*, 527 U.S. 706 (1999); *Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank*, 527 U.S. 627 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996). Even in the two most recent Eleventh Amendment cases, *Board of Trustees of the University of Alabama v. Garrett*, 121 S.Ct. 955 (2001), and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), members of the state-power quintet have broken rank and written concurring opinions.

troubling to see so many changes in federalist law unaccompanied by the guidance of any federalist doctrine.